Legal Cases Relevant to Probation & Court Activities

Revised February 2000

Compiled by: Max Bessler
Office of the Legal Defender, Maricopa County

Table of Contents

Aggravating/Mitigating Sentencing Factors

General Principles

The court may consider the defendant's former status as a police officer as an aggravating factor. *State v. Elliget.*

The court may not consider mere arrests as aggravating factors. However, the court may consider other crimes committed on the same occasion, even if not charged. *State v. Schuler*.

In cases involving jury verdicts, pleas of no contest, or Alford pleas, the defendant may maintain his or her innocence without it being used against the defendant as an aggravating factor. *State v. Holder*.

Juvenile adjudications may be considered by the court in determining an appropriate sentence. *State v. Levitt*.

The defendant has the right not to answer the presentence investigator's questions and may not be penalized for doing such. His or her silence may not be used as an aggravating factor. *State v. Kerekes*.

A probation officer's recommendation may not be used as an aggravating factor. *State v. Romero*.

A stipulated sentence in a plea agreement may not be used as an aggravating factor. *State v. King*.

State v. Harrison, 306 Ariz. Adv. Rep. 31 (1999) - The trial court must state on the record the reasons for deviation from the presumptive sentence. At a minimum, this means articulating at sentencing the factors the judge considered to be aggravating or mitigating and explaining how these factors led to the sentence imposed.

Division One and Division Two of the court of appeals have taken different approaches to cases in which the trial court does not state on the record its reasons for imposing the presumptive sentence. In *State v. Harrison*, 273 Ariz. Adv. Rep.53 (1998), Division One held that such cases had to be remanded for re-sentencing because this omission was structural error, not harmless. However, Division Two held in *State v. Ybarra*, 149 Ariz. 118, 120, 716 P.2d 1055, 1057 (App. 1986) that in cases where the court did not state on the record its reason for a sentence other than presumptive, the error was technical and harmless because the sentencing transcript supported the mitigated sentence. Resentencing in such cases was not required.

In granting review of this case, the Arizona Supreme Court wanted to resolve the conflict between these two differing approaches. After the defendant was convicted in this matter, the court

went into a lengthy discussion of the defendant's behavior, but did not state why she imposed less than the presumptive sentence. The defendant appealed.

The supreme court held that the trial court must state the reasons for such deviation on the record. At a minimum, "this means articulating at sentencing the factors the judge considered to be aggravating or mitigating and explaining how these factors led to the sentenced (sic) imposed." In doing this, it permits the court of appeals to determine whether or not the trial court correctly considered the aggravating and mitigating factors. The supreme court remanded this case for re-sentencing.

State v. Elliget, 177 Ariz. 32, 864 P.2d 1064 (1993) - Injury to community may be used as an aggravating factor.

The court of appeals found that " . . . the trial court may properly consider as aggravating the special injurious consequences to the community resulting from this crime being committed by a police officer."

State v. King, 141 Ariz. Adv. Rep. 29 (1993) - Stipulated plea may be used as an aggravating factor.

At sentencing, the trial court included the stipulated plea agreement as one of the aggravating factors in imposing the sentence. The court of appeals found that while " . . . a stipulated sentence is <u>not</u> an aggravating factor, whenever the parties stipulate to a sentence the judge must necessarily take the fact into account in passing sentence." The court of appeals suggested a more artful way of considering the stipulated sentence.

State v. Romero, 126 Ariz. Adv. Rep. 32 (1992) - Mere arrests and presentence officer's recommendation may not be used aggravating factors.

The defendant pled guilty to two of eleven counts of fraudulent schemes. The plea agreement provided for a sentencing range of seven to fourteen years. The court sentenced the defendant to concurrent twelve-year terms. The defendant appealed, noting the judge had used her arrest and the presentence investigator's recommendation as basis for the aggravated sentence.

The court of appeals, citing *State v. Schuler*, 162 Ariz. 19, ruled the trial court erred in considering the defendant's mere arrests. Although the defendant had a number of arrests over the years, she had only one prior conviction occurring nineteen years earlier.

The court of appeals also disapproved of the trial court using the presentence investigator's recommendation as an aggravated factor. It reemphasized that the investigator's recommendation " . . . is merely an opinion--not something that calls for determination of truth. Nor is it a characteristic of the defendant or the crime." The case was remanded for resentencing.

State v. Shuler, 780 P.2d 1067 (1989) - Mere arrests may not be used as an aggravating factor.

The court may not consider mere arrests which are unsupported by evidence of bad acts or illegal conduct. If the court " . . . aggravates a sentence on the mere report of an arrest with no evidence to demonstrate that a crime or some bad act was probably committed by the defendant, the court errs." The fact of arrest does not establish that the defendant committed a crime. The court may consider other crimes that the defendant committed on the same occasion even if not charged.

State v. McCuin, 808 P.2d 332 (1991) - Court may impose aggravated sentence in one count and mitigated sentence in a second count.

The court of appeals held that it is within the court's sentencing discretion to sentence the defendant to an aggravated prison sentence in one count and then grant a mitigated sentence of probation in a second count when it properly considered the aggravating and mitigating factors.

State v. Holder, 155 Ariz. 80 (1987) - In a jury trial, the court may not use the defendant's maintained innocence as an aggravating factor.

The defendant maintained his innocence following a jury verdict. The court imposed an aggravated sentence citing the defendant's failure to acknowledge guilt leading the court to believe the prospects for rehabilitation were negligible. The court of appeals vacated the sentence stating the defendant had the right against self-incrimination.

Arnett v. Ricketts, 665 F. Supp. 1437 D (1987) - Without Miranda warnings by probation officers, defendant's admission of other crimes and certain department of corrections may not used as aggravating factors.

One reason given for overturning the defendant's death sentence was that the probation officer did not give Miranda warnings to the defendant before questioning him about his prior convictions. The defendant admitted having prior convictions during the presentence interview. These admissions alone were used to aggravate the sentence. Further, the probation officer used California Department of Correction's records which included a psychological report designating the defendant as a pedophile. Since the defendant had no opportunity to confront the doctors who prepared this evaluation, the court ruled his rights had been violated. These factors could not be used to aggravate the sentence.

State v. Levitt, 747 P.2d 607 (1987) - Juvenile adjudications may be used as aggravating factors.

The defendant's prior juvenile adjudications may be considered in determining an appropriate disposition. Juvenile court may release all information in its possession when requested for a presentence investigation (A.R.S. § 8-208).

State v. Kerekes, 138 Ariz. 235 (1983) - The defendant does not have to answer probation officer's questions and this may not be used as an aggravating factor.

The defendant has the right not to answer the presentence investigator's questions and it is improper for the court to aggravate the defendant's sentence for employing his right to remain silent.

Jones v. Cardwell, 686 F.2d 757 (1982) - Defendant's admission to uncharged crimes could not be used as an aggravating factor. Probation officer violated defendant's Fifth Amendment right.

The defendant was advised in writing and verbally that he was under court order to follow all instructions during the presentence process. The probation officer questioned the defendant about the convicted crime as well as any additional criminal activity for which the defendant was responsible. The defendant admitted guilt to other uncharged offenses and provided a written confession which was attached to the presentence report. The sentencing judge relied upon this information in imposing the sentence. The federal court held the defendant's Fifth Amendment rights were violated and these factors could not be used in determining an appropriate sentence.

Assessments, Fines, Time Payments, and Surcharges

General Principles

The time payment fee established by A.R.S. § 12-116.

The penalty assessments (surcharges) established by A.R.S. § § 12-116.01 and -116.02.

A.R.S. § § 12-116.01(D) and -116.02(D) permit the court to waive the penalty assessments (surcharges) if payment works a hardship on the defendant or his/her family.

Felony and misdemeanor penalty assessments contained in A.R.S. § 13-812 were repealed effective January 1, 1994. These assessments, as well as crime laboratory assessment contained in A.R.S. § 13-813, and DUI surcharges in A.R.S. § § 28-1076.01 and 36-2219, were replaced by an increase in the surcharges beginning January 1, 1994.

A restitution lien may be filed as outlined by A.R.S. § 13-804.

Wages may be garnished for nonpayment of fines, fee, restitution, or incarceration costs in compliance with A.R.S. § 13-812.

It may be fundamental error for the trial court not to consider waiving the surcharge if the defendant is indigent. *State v. Beltran, State v. Torres-Soto*.

Time payments are to be assessed for each "time payment plan" assessed against the defendant. *State v. Pennington.*

Payment of assessments, fees and surcharges must be imposed at the time of sentencing. *State v. Oatley.* If the court forgets to impose these, the defendant must be resentenced with the defendant present. However, the payment schedule may be set by minute entry if forgotten. *State v. Snead*.

An undesignated offense must be treated as a felony and assessed the felony penalty. *State v. Arana.*

An increase in the surcharge rate is a substantive change and may not be applied to those defendants whose offense(s) occurred before the enactment date of the increase. *State v. Beltran.*

The time payment fee is an administrative fee and may be applied to all cases after its enactment date. *State v. Thomas.*

Penalty assessments may be levied against each count or cause number except convictions involving DUI and aggravated DUI. *State v. Bruggeman, State v. Weston,* and *State v. Ramos*.

Fines established by A.R.S. § § 13-801, -802 and -803.

Fines must be imposed at the time of sentencing. *State v. Oatley*.

Preparatory offenses do not require the imposition of mandatory fines. *State v. Wise* and *State v. Tellez.*

The court must impose mandatory fines. *State v. Vargas-Burgas*.

Felony Assessments

State v. Alexander, 146 Ariz. Adv. Rep. 17 (1993) - Penalty cannot be levied in multiple charges if all the charges rose from a single criminal episode.

The defendant was sentenced to prison for aggravated robbery, residential burglary, theft, and aggravated assault. The trial court assessed the defendant $400 in felony penalty assessments. On appeal, the court of appeals held that the trial court erred by not following the guiding principles of *State v Gordon*, 161 Ariz. 308 (1989) in determining if all of these charges arose from a single criminal episode. If they did, as the court of appeals found in two of the defendant's convictions, the penalty assessments could not be levied. Accordingly, the court of appeals reduced the assessment from $400 to $200.

State v. Snead, 131 Ariz. Adv. Rep. 30 (1993) - Payment schedule can be set by minute entry.

The defendant was convicted of aggravated assault, a class three, dangerous felony. He was sentenced to prison and ordered to pay a $100 felony assessment and an $8 time payment fee. However, at sentencing the court neglected to provide a payment schedule. One was provided in the minute entry. As part of his appeal, the defendant argued the court could not establish the schedule by minute order and had to resentence him.

The court of appeals found that while payment of the assessment and fee had to be part of the sentence, the payment schedule did not. Accordingly, it could be set by minute entry. The sentence was confirmed.

State v. Arana, 128 Ariz. Adv. Rep. 5 (1993) - Undesignated offenses will be treated as felonies until designated as a misdemeanor.

The defendant pled guilty to a class six, undesignated offense. She was placed on probation and ordered to pay the $100 felony assessment. The defendant appealed the assessment. The court of appeals reversed the imposition of the assessment holding that when a court suspends the designation of an offense under A.R.S. § 13-702 (H), " . . . it may not impose sanctions that exceed the statutory parameters for misdemeanors." The state petitioned the Arizona Supreme Court for review.

The Arizona Supreme Court reversed the court of appeal's decision. Citing A.R.S. § 13-702 (H), the Arizona Supreme Court noted it expressly provides that: "The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor." The court found this language unequivocal in so far as the felony assessment was concerned. Moreover, the court cited *State v. Sweat,* 143 Ariz. 266 and *State v. Rischer*, 117 Ariz. 587, in which it held that a defendant found guilty of an undesignated felony offense may be placed on probation for a period of time longer than the maximum sentence for a misdemeanor and still have the offense designated as a misdemeanor upon successful completion of probation.

State v. Anderson, 109 Ariz. Adv. Rep. 19 (1992) - The time payment fee and felony assessment if omitted at the time of sentencing may be added.

The Arizona Supreme Court held that a trial court may correct a sentencing to add the statutorily required time payment fee and felony assessment if omitted at the time of sentencing as outlined in *Powers*, (154 Ariz. 291). However, " . . . the proper method of correcting an illegal sentence is not by minute entry, but in open court with the defendant present."

State v. Perez, 107 Ariz. Adv. Rep. 20 (1992) - No assessment can be added in cases sentenced under A.R.S. § 13-3601 since there is no conviction.

The court imposed a $100 felony assessment following the defendant's conviction of attempted kidnaping, a class 3 felony and placed the defendant on probation under A.R.S. § 13-3601 (domestic violence) in which the court does not enter a judgment of guilt. The court of appeals ruled the sentencing court did not have jurisdiction to impose the felony assessment since there was no conviction.

State v. Bruggeman, 779 P.2d 823 (1989)

Multiple victim compensation assessments do not constitute double punishment for the same act where there are two counts and two victims.

State v. Weston, 1 CA-CR 11407 Department D (Memorandum Decision 1988)

The court may assess only one felony assessment in cases of DUI and DUI over .10 percent since they are viewed as one crime.

State v. Ramos, 747 P.2d 629 (1987)

An individual must be assessed a separate $100 felony penalty for each felony for which he is convicted.

State v. Sheaves, 747 P.2d 1238 (1987)

Only one felony penalty assessment may be imposed upon a defendant convicted of multiple felonies arising from the same act of driving in violation of A.R.S. § § 28-692(A) and (B) and -692.01.

State v. Powers, 742 P.2d 792 (1987)

Statutory requirements such as A.R.S. § 13-812 may be added after sentencing if the court forgets to do so.

Fines

State v. Oatley, 133 Ariz. Adv. Rep. 44 (1993) - Surcharge cannot be removed if part of a plea agreement without consent of the state.

The defendant entered a plea to possession of marijuana, a class one misdemeanor and agreed to pay a fine of $750 plus a 40 percent surcharge. At sentencing, the court waived the surcharge and denied the state's ensuing motion to withdraw from the plea. The state appealed, contending the court modified the terms of the plea agreement over the state's objections. The court of appeals noted that once the parties reached an agreement and the court accepts it, the court may not change the agreement without giving both parties the opportunity to withdraw. Since the surcharge is part of the sentence and not probation, in which the court has continuing jurisdiction, *State v. Patel*, 160 Ariz. 86, did not apply. The case was remanded.

State v. O'Guin, 811 P.2d 790 (Ariz. App. 1991) - The court, not the probation officer, must determine the payment schedule.[1]

[1]A.R.S. § 13-804(D) since 1992 permits court or court staff including probation officers to establish the payment schedule after the court has determined the total amount of the financial obligation.

The court may not delegate the responsibility for determining the payment schedule of a fine payment. Like restitution, the court, not the probation officer, must determine payment schedule. Similarly, the court may not designate all of the $8 time payment fee to be paid to the Judicial Collection Enhancement Fund. Of the $8, $3 is to go to JCEF; $2 to the Public Defender's Training Fund; and $3 to the court. The case was remanded in both instances.

State v. Scroggins, 810 P.2d 631 (1991)

Although the plea agreement stipulated that the defendant would pay restitution not to exceed $2,000, the presentence investigation did not provide an amount of the victim's loss. Despite this, the court imposed the restitution amount of $2,000. The court of appeals held that this was improper because the victim's losses were never determined. The matter was remanded to the trial court for an evidentiary hearing to determine victim's losses.

In this same case, defendant was ordered to pay a fine of $2,000 to Drug Enforcement as part of the plea but the corresponding drug charges were dropped. The defendant appealed the fine alleging she had been convicted of no drug charges. The court of appeals noted as a result of her felony conviction the defendant could be fined up to $150,000. The distribution of the fine did not affect the ability to impose it. The fine was upheld.

State v. Wise, 795 P.2d 217 (1990)

The mandatory fine of A.R.S. § 13-3408(E) does not apply to defendants convicted of attempted possession of drugs.

State v. Tellez, 799 P.2d 1 (1989)

Solicitation, like attempt, does not invoke the mandatory fines for drug offenses.

State v. Vargas-Burgas, 783 P.2d 264 (1989)

The court must impose statutorily mandated fines or the sentence is illegal.

Surcharges

State v. Beltran, 189 Ariz. 321, 942 P2d 480 (1997) - It is fundamental error for the court not to waive surcharge for hardships.

The defendant was found guilty of transportation of marijuana for sale and sentenced to prison. Additionally, he was ordered to pay a fine of $110,000 and a 59% surcharge of $64,900. The defendant appealed the surcharge arguing the court should have waived the surcharge in view of his indigency.

The court of appeals concurred with the defendant's argument. A.R.S. § 12-116.01(D) and -116.02(D) both permit the court to waive the surcharge if payment would work a hardship on the defendant or his family. As in the case of *State v. Torres-Soto*, 187 Ariz. 144, 927 P.2d 804 App. 1996), the court of appeals noted that for the court not to considering waive a surcharge when the defendant is indigent may be fundamental error. "*Torres-Soto* instructs counsel that it is imperative to address whether surcharges should be waived in the sentencing of their clients . . .." The order for the surcharge was vacated.

State v. Torres-Soto, 187 Ariz. 144, 927 P.2d 804 (1996) - Courts have the discretion and responsibility, to consider the hardship issue when deciding surcharges and attorneys' fees.

The defendant, an indigent, was sentenced to prison for importation of marijuana. The trial court also imposed a fine, fee, and surcharges totaling $235,887. Although the defendant did not raise the issue of the surcharge in his appeal, the court of appeals ordered supplemental briefings on whether the trial court committed fundamental error in assessing the surcharge to an indigent. In its findings, the court of appeals affirmed the fine which was mandated by A.R.S. § 13-3405(D), but noted the trial court had discretion in assessing the surcharge and attorney fees. Rule 6.7(d), Arizona Rules of Criminal Procedure provides that the court shall assess attorneys' fees for court-appointed counsel provided " . . . he or she is able to pay without incurring substantial hardship to himself or herself or to his or her family." A.R.S. § § 12-116.01(D) - .02(D) allows the trial court to waive all or part of a penalty assessment if " . . . the payment of which would work a hardship on the persons convicted or adjudicated or on their immediate families."

In conclusion, the court of appeals noted, "Trial courts have the discretion, and therefore the responsibility, to consider the hardship issue when deciding whether to enhance mandatory fines with surcharges and attorneys' fees." The conviction was affirmed, but the surcharges and attorneys' fees were vacated.

State v. Oatley, 133 Ariz. Adv. Rep. 44 (1993) - Surcharge cannot be removed if part of a plea agreement without consent of the state.

The defendant entered a plea to possession of marijuana, a class one misdemeanor and agreed to pay a fine of $750 plus a 40 percent surcharge. At sentencing, the court waived the surcharge and denied the state's ensuing motion to withdraw from the plea. The state appealed, contending the court modified the terms of the plea agreement over the state's objections. The court of appeals noted that once the parties reached an agreement and the court accepts it, the court may not change the agreement without giving both parties the opportunity to withdraw. Since the surcharge is part of the sentence and not probation, in which the court has continuing jurisdiction, *State v. Patel*, 160 Ariz. 86, did not apply. The case was remanded.

State v. Beltran, 105 Ariz. Adv. Rep. 38 (1992) - An Increase in the Surcharge Rate Is Increased Punishment and *Ex Post Facto*

The defendant committed an offense November 12, 1989, when the law required a 37% surcharge to any fine. Effective October 1, 1990, the surcharge changed to 40%. The defendant was sentenced February 20, 1991, and the court imposed a 40% surcharge. The court of appeals ruled the new surcharge was a substantive change in the law and increased the punishment, hence imposed an *ex post facto* law upon the defendant. The case was remanded to change the surcharge to 37%.

Time Payment Fee

State v. Pennington, 164 Ariz. Adv. Rep. 4 (1994) - the time payment fee should be imposed for each time payment plan, not for each component of each plan.

The Arizona Supreme Court reviewed this matter to resolve the conflict between the imposition of the time payment fee in this case and *State v. Rivera*, 172 Ariz. 247 and *State v. Reynolds*, 175 Ariz. 207. In this case, the defendant was charged with two different crimes in two separate cause numbers. When the trial court sentenced him for both matters on the same day, it imposed two separate time payment fees. The Arizona Supreme Court noted that in the *Rivera* case, the court of appeals held that only one time payment fee should be imposed when a defendant is ordered to make payments on two counts in one case. In the *Reynolds* case, the court of appeals held that a trial court should order only one time payment fee when a defendant is ordered to make payments in two separate cases.

Noting that at least part of the purpose of the assessment was to offset increased court costs incurred by deferred payments, the Arizona Supreme Court held " . . . that A.R.S. § 12-116 requires a separate time payment fee for each time payment plan approved and ordered by the court. We emphasize that the fee is for each plan, not for each component of each plan. Thus, one time payment fee should be imposed on each count or case in which a time payment plan is approved, even though that plan may include, for example, a fine, a felony assessment, and restitution." The Arizona Supreme Court disapproved of *State v. Rivera* and *State v. Reynolds* to the extent that they held or suggested otherwise. "Under A.R.S. § 12-116(A), a trial court should order one time payment fee for each time payment plan."

State v. Anderson, 109 Ariz. Adv. Rep. 19 (1992) - The time payment fee and felony assessment if omitted at the time of sentencing may be added.

The Arizona Supreme Court held that a trial court may correct a sentencing to add the statutorily required time payment fee and felony assessment if omitted at the time of sentencing as outlined in *Powers*, (154 Ariz. 291). However, " . . . the proper method of correcting an illegal sentence is not by minute entry, but in open court with the defendant present."

State v. Beckerman, 91 Ariz. Adv. Rep. 67, 814 P.2d 1388 (1991) - The time payment fee is procedural in nature and not additional punishment, therefore is not *ex post facto*.

The defendant claimed that the $8 time payment fee was *ex post facto* in his case and was an unequal punishment for those who could not pay total payments at the time of sentencing. The court reiterated that the time payment is procedural in nature and does not impose any penalty *ex post facto*. *State v. Weinbrenner*, 164 Ariz. 592 (1990). The court further found the fee did not violate equal protection since it was " . . . an administrative processing fee used as a means of effectively collecting and processing time payments to the court." It was rationally related to the legitimate state interest of facilitating the collection of fines, penalties, and sanctions.

State v. Thomas, 799 P.2d 914 (1990) - The time payment fee is procedural in nature and not additional punishment, therefore is not *ex post facto*.

The $8 time payment fee (A.R.S. § 12-116) may be applied to crimes committed before the statute went into effect since it is simply an administrative fee attached to restitution or a fine.

State v. Weinbrenner, 795 P.2d 235 (1990) - The time payment fee is procedural in nature and can be added to crimes committed before the effective date of the fee statute.

The $8 time payment fee may be applied to defendants who committed their crimes before June 28, 1989, since it is a procedural rule.

Community Supervision

State v. Razo, 306 Ariz. Adv. Rep. 16 (1999) - A.R.S. § 13-603(J) requires the period of community supervision to be expressed in months and years, not based upon the number of days based upon computations from his sentence.

When the trial judge sentenced the defendant to prison, he also ordered the prison sentence to be followed by a period of community supervision "of one day for every seven days of the sentences imposed." The defendant filed for post-conviction relief, contending the community supervision had to be expressed in months or years. When the trial court dismissed his petition, the defendant appealed.

The court of appeals noted that A.R.S. § 13-603(J) requires the period of community supervision to be expressed in months and years. The defendant was granted relief. His period of community supervision was revised to reflect the number of months.

State v. Jenkins, 275 Ariz. Adv. Rep. 24, 970 P.2d 947 (1998) - Those Sentenced to flat prison terms must have community supervision imposed. It does not constitute double jeopardy. A plea is invalid if defendant was not advised of community supervision.

The defendant pled guilty to second-degree murder and was sentenced to prison for 20 calendar years and imposed community supervision. As part of his petition for review, the defendant argued that since he had to complete all of his sentence, the trial court could not impose community supervision.

The court of appeals rejected this argument. In most instances, prisoners are eligible for earned release credits as provided in A.R.S. § 41-1604.07(A) at the rate of one for each six days served, except for those who must serve their full sentence. Usually community supervision begins at the time of the earned release. However, it can begin at the expiration of the sentence. In fact, A.R.S. § 41-1604.07(E) speaks to those instances when a prisoner refuses community supervision. In those instances, the prisoner forfeits any earned time and must complete community supervision while serving the remainder of his sentence. The court of appeals concluded that the defendant was subject to community supervision at the expiration of his sentence and that it did not constitute double punishment, since community supervision was part of the original punishment.

In another part of his petition for review, the defendant argued his plea was involuntary because he was not informed of the requirement for community supervision. The court of appeals noted that Rule 17.2 requires that the court advise the defendant of the nature and range of possible sentence for the offense which should include the requirement to serve a term of community supervision. See *State v. Crowder*, 155 Ariz. 477, 747 P.2d 1176 (1987). However, the failure to formally inform defendant of community supervision does not necessarily mean his plea was involuntary, however. The information that was not provided must be relevant to the decision making process to enter a plea and the record must show that the defendant was not otherwise informed of the community supervision requirement. Since the record did not reflect this, this part of the defendant's sentence was remanded for an evidentiary hearing to determine if the defendant had knowledge of community supervision from any source. If he did not, then the court must determine if that lack of knowledge was relevant to his decision to accept the plea.

Consecutive/Concurrent Sentences

General Principles

The Arizona Supreme Court held that A.R.S. § 13-708 simply creates a default designation applicable when a judge fails to specify whether the sentences should be consecutive or concurrent but that the judge is not required to sentence defendants to should serve consecutive sentences. The statute does not presume consecutive sentences. *State v. Garza*.

The sentence imposed for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on that person at any time. [A.R.S. § 13-604.01(J)].

Sentences imposed for crimes committed while on probation or parole are to be consecutive to the original sentence (A.R.S. § 13-604.02).

Sentences imposed for escape in the second or first degree must be served consecutively to any original sentence or period of community supervision (A.R.S. § § 13-2503 and 2504).

If probation is granted to a defendant serving prison on a different conviction, probation begins following the person's prison sentence [A.R.S. § 13-903 (E)].

If probation is ordered to follow a prison sentence, it may begin upon the defendant's actual physical release from prison or following absolute discharge from prison. *State v. Gandara* and *State v. Ball*.

Terms of probation may not be imposed consecutively. *State v. Shepler* and *State v. Pokula*.

State v. Garza, 273 Ariz. Adv. Rep. 32, 962 P.2d 898 (1998) - A.R.S. § 13-708 does not presume all sentences have to be consecutive, but is a default if the judge fails to stipulate between consecutive and concurrent.

The trial judge sentenced the defendant to consecutive sentences stating he felt the sentences were harsh but that he was required to by A.R.S. § 13-708 which he interpreted contained a presumption that a defendant convicted of multiple charges should serve consecutive sentences. The defendant appealed. The court of appeals concurred that A.R.S. § provided a presumption that sentences will run consecutively.

The Arizona Supreme Court held that the statute simply created a default designation applicable when a judge failed to specify whether the sentences should be consecutive or concurrent as

reasoned in *State v. Fillmore*, 187 Ariz. 174, 927 P.2d 1303 (App. 1996) and *State v. Alcorn*, 136 Ariz. 215, 665 P.2d 97 (App. 1983). The court vacated the sentences and remanded to the trial court.

State v. Harper, 151 Ariz. Adv. Rep. 26 (1993) - Court to use elements of crime to determine if sentence can be consecutive.

The defendant was convicted of theft and money laundering, and was sentenced to consecutive sentences. On appeal, he argued that *State v. Gordon*, 161 Ariz. 308, described the offenses as indistinguishable and precluded consecutive sentences. The court of appeals reiterated the principles established by *Gordon* and *Tinghitella*, 108 Ariz. 1, which instruct the court " . . . to eliminate the evidence necessary to convict on the ultimate charge and then determine if the remaining evidence satisfies the elements of the other charge, in which case consecutive sentences are permissible." In this matter, the court of appeals held that money laundering had different elements from theft. The appeal was denied.

State v. White, 770 P.2d 328 (1989) - To impose consecutive sentences, the court must use "identical elements" test

To impose consecutive sentences, the court must use "identical elements" test, i.e., when the evidence supporting one charge is eliminated, the second charge will be supported by the remaining evidence. Enhanced sentencing options for those who commit crimes while on probation or parole are constitutional.

State v. Gandara, 105 Ariz. Adv. Rep. 42 (1992) - Probation supervision may begin upon release from prison or after completing parole.

The defendant was sentenced to the Department of Corrections on one cause of DUI, a class 5 felony, and granted two three-year probation terms on two other causes of DUI, both class 5 felonies. The six months' mandatory period of imprisonment as a condition of probation was to be served concurrent with the Department of Correction's sentence. Probation was ordered to begin upon the defendant's release from parole. The defendant appealed in part citing that probation should begin upon his physical release from prison, not parole.

The court of appeals disagreed, indicating that while the court may start probation upon release from prison, it may also begin probation upon completion of parole. To be more definite, the order was modified to have probation begin upon the defendant's "absolute discharge from his sentence."

State v. Ball, 758 P.2d 653 (1988) - Probation can commence upon release from prison.

The court has the right to impose probation to commence on the first day following defendant's release from prison in the second cause number. "Probation begins upon defendant's physical release from prison."

State v. Rushing, 749 P.2d 910 (1988) - Court, not jury, determines if defendant was on probation when the offense was committed.

The essential point of the A.R.S. § 13-604.02 enhanced sentence provision is not whether the defendant committed and admitted to a new crime, but rather that the court found independent of his admission that it occurred while he was on probation.

The court has the right to take judicial notice that the defendant was on probation when a new offense was committed; it is not a jury question. If the court finds such, the sentence must be consecutive.

State v. Barksdale, 694 P.2d 295 (1985)

Sentences imposed for crimes committed while on probation (A.R.S. § 13-604.02) must be consecutive to any period of imprisonment imposed from the original conviction and the defendant must be advised of such.

State v. Shepler, 141 Ariz. 43, 684 P.2d 924 (1984)

Consecutive terms of probation are not authorized.

Anderjeski v. City Court of Mesa, 663 P.2d 233 (1983)

Defendant may not be punished with consecutive sentences, for DUI and DUI over .10% arising out of same conduct.

State v. Pokula, 113 Ariz. 122, 547 P.2d 476 (1976)

Terms of probation may not be imposed consecutively.

Dangerous Crimes Against Children

General Principles

Dangerous crimes against children established by A.R.S. § 13-604.01.

The sentence imposed for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on that person at any time. [A.R.S. § 13-604.01(J)].

Lifetime probation for a conviction of dangerous crimes against children is permissible, but lifetime parole is not. *State v. Lyons* and *State v. Wagstaff*.

State v. Zimmer, 140 Ariz. Adv. Rep. 14 (1993) - Dangerous Crimes Against Children statute requires consecutive sentences.

The 51-year-old defendant was convicted by a jury of three counts of child abuse, all dangerous crimes against children. The trial court sentenced the defendant to one prison term of five years and one term of 12 years consecutively, and the remaining sentences concurrent to these. The state appealed noting A.R.S. § 13-604.01 required all the sentences to be imposed consecutively. The trial court felt to do so would be disproportionate to the crimes as occurred in *State v. Barlett*, 171 Ariz. 302. The court of appeals found substantial differences between this case and *Barlett*. The original sentence was modified to provide that each prison term would be consecutive as provided by the statute.

State v. Lyons, 804 P.2d 744 (1990)

The Arizona Supreme Court held that lifetime probation for dangerous crimes against children in the second degree is constitutional; it is not vague and does not violate separation of judicial (probation) and executive (parole) power.

State v. Berger, 793 P.2d 1093 (1990)

This case was decided concurrently with *State v. Wagstaff*, 164 Ariz. 485 (1990), by the Arizona Supreme Court. It reaffirmed that lifetime parole violated the separation of powers doctrine and vacated such sentence in this matter.

State v. Wagstaff, 794 P.2d 118 (1990)

The Arizona Supreme Court ruled that lifetime parole for first degree child offenses was unconstitutional because:

> It violated separation of powers by giving the court [judicial branch] power to grant parole which is legally the right of the parole board [executive branch]; Since first degree offenders must serve all sentences imposed [parole ineligible], it is impossible to impose lifetime parole. There would be no sanction for parole violation.

State v. Stellwagen, 775 P.2d 543 (1989)

The court may impose lifetime probation in dangerous crimes against children offenses in the second degree but lifetime parole in dangerous crimes against children in the first degree is invalid. *State v. Wagstaff*.

State v. Lee, 774 P.2d 228 (1989)

Lifetime parole in second degree dangerous crimes against children is valid since some of the prison sentence could be used for a revocation of parole, whereas in first degree dangerous crimes against children, which require serving hard time, there is no time available for a sanction in case of parole violation.

Death Penalty Issues

General Principles

Statutory aggravating and mitigating circumstances are provided in A.R.S. § 13-703(F) and (G).

The burden of establishing aggravating circumstances is on the prosecution. The burden of establishing mitigating circumstances is on the defendant. [A.R.S. § 13-703(C)].

Crimes for which a sentence of death has been imposed may be appealed in the state court system only to the Arizona Supreme Court. (A.R.S. § 13-4031).

When a defendant has been sentenced to death, the clerk shall file an automatic appeal on his behalf. Rule 31.2(b) Ariz.R.Crim.P.

The trial court will consider any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether a sentence less than death might be appropriate. *State v. McCall*.

The trial court has discretion in deciding how much weight to give to the mitigating factors that the defendant offers. *State v. Atwood*.

Defendant must establish mitigating factors by a preponderance of the evidence. *State v. Fierro*.

The trial court should place on the record a list of all factors offered by a defendant in mitigation and then explain the reason for accepting or rejecting them. *State v. Leslie* and *State v. Gallegos*.

The Arizona Supreme Court must independently review the aggravating and mitigating circumstances to ensure that the trial court properly imposed the death penalty. *State v. Fulminante*, 161 Ariz. 237 (1988).

The death penalty statute is not a recidivist or enhancement statute, but rather, the aggravation/mitigation hearing is to determine the propensity and character of the defendant. Consequently, other murder convictions committed at or near the same time regardless of the order in which the convictions were entered, may be considered by the trial court. *State v. Gretzler*.

The Arizona Supreme Court will consider five factors to determine if a murder was especially heinous or depraved: 1) relishing the murder, 2) inflicting gratuitous violence, 3) mutilating the

victim, 4) the senselessness of the murder, and 5) the helplessness of the victim. The first three factors are given the most weight. *State v. Gretzler*

A murder is especially cruel if the victim consciously experiences physical abuse or mental anguish before death. *State v. Lopez*. To support a finding of cruelty, the state must prove beyond a reasonable doubt that the victim was conscious and suffered pain or distress at the time of the offense. *State v. Jimenez*, 165 Ariz. 444 (Ariz. 1990). To find cruelty, the state must prove beyond a reasonable doubt that the victim consciously suffered physical pain or mental distress. *State v. Amaya-Ruiz*, 166 Ariz. 152 (1990). If the evidence is inconclusive as to whether the victim was conscious during the infliction of violence, the court may not find that the killing was especially cruel. *State v. Gillies*

The Arizona Supreme Court identified witness elimination as an aggravating factor. *State v. Ross*

Mere participation in a crime resulting in a homicide is not enough to impose the death penalty. *State v. Lacy*

Where shots, stabbings, or blows are inflicted in quick succession, one of them leading rapidly to unconsciousness, a finding of cruelty, without any additional supporting evidence, is not appropriate. *State v. Ortiz*, *State v. Bishop*, and *State v. Ceja*

Victim impact testimony and survivors' recommendations are not relevant to any statutory aggravating factors and are not to be considered by the trial court. *State v. Bolton*,182 Ariz. 290, *State v. Atwood*, *State v. Spears*, 184 Ariz. 277, *State v. Roscoe*, 184 Ariz. 484, *State v. Gulbrandson*, 184 Ariz. 46, and *State v. Williams*, 166 Ariz. 132

Severe emotional and physical abuse as a child will be considered a relevant mitigating factor only if a defendant can show that something in that background had an effect or impact on his behavior that was beyond his control, *State v. Wallace*; or when the abuse affected the defendant's behavior at the time of the crime. *State v. Murray*, 184 Ariz. 9

Intoxication, by itself, does not constitute mitigation. *State v. Lopez*

Defendant's changed character since imprisonment will be considered a mitigating factor. *State v. Richmond*.

The defendant's ability to be rehabilitated and evidence that indicated the defendant's cocaine addiction significantly impaired his capacity to conform his conduct to the requirements of the law will be considered as mitigating factors. *State v. Rossi*.

The defendant's age, model behavior as a prisoner, efforts to further his education, the fact that the victim shot first, and the codefendant's sentence to life imprisonment outweighed the aggravating factors. *State v. Watson*.

The court must consider the defendant's mental condition to determine whether it in some way suggests that the defendant should be treated with leniency. *State v. McMurtrey*.

Disparity in the sentences given a defendant and an accomplice can be a mitigating factor. *State v. Marlow*, 163 Ariz. 65, 786 P.2d 395 (1989). When it is considered, disparity is mitigating only when it is unexplained. *State v. Stokley*, 182 Ariz. 505, 898 P.2d 454 (1995); *State v. Schurz*, 176 Ariz. 46, 859 P.2d. 156 (1993).

Aggravating/Mitigating Factors

State v. Kayer, 298 Ariz. Adv. Rep. 3 (1999) - The defendant has the right to control and direct and therefore can decline mitigation efforts.

The defendant was sentenced to death for killing a man and taking his money, watch and jewelry. Following the jury's verdict, the defendant requested that sentencing be expedited. He refused to cooperate with the state-appointed mitigation specialist, but did want her and his counsel to advocate seven mitigation factors.

On appeal, among other issues, the defendant argued that the trial court erred in allowing the defendant to control the presentation of the mitigation evidence. His argument relied upon *State v. Nirschel*, 155 Ariz. 206, 745 P.2d 953 (1987) in which the Arizona Supreme Court held that only three decisions were exclusively within the province of the defendant: (1) whether to plead guilty, (2) whether to waive a jury trial, and (3) whether to testify. However in their review, the Justices pointed out these three areas were supplemented by a fourth in *State v. Roscoe*, 184 Ariz. 484, 910 P.2d 635 (1996), to include the right to control mitigation. The court held that the trial court acted appropriately in allowing the defendant to determine the direction of his mitigation efforts.

The court went on in its review to note the defendant did not offer sufficient evidence that his mental illness or substance abuse prevented him from conforming to the law or appreciating the wrongfulness of his actions. The court observed that " . . . in addition to offering equivocal evidence of mental impairment, defendant offered no evidence to show the requisite causal nexus that mental impairment affected his judgment or his actions at the time of the murder. See *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996)."

The defendant's military record, the disparity between the defendant's and the co-defendant's sentences, the defendant's high level of intelligence, post-conviction physical health, ability to contribute to society, and the high cost of execution were properly found by the trial court to have no mitigation value. The court was particularly emphatic in denying the cost of execution as a mitigating factor, holding that:

> To do so would contradict Arizona's public policy decision and would violate the court's mandate to consider mitigating factors that relate not to cost, but to a "defendant's character, propensities or record and any circumstances of the offense" under section 13-703(G).

The defendant's conviction and sentence were affirmed.

State v. Clabourne, 298 Ariz. Adv. Rep. 12 (1999) -The cost of imposing the death penalty is not a mitigating factor.

In reviewing the defendant's sentence to death and the mitigation factors, the Arizona Supreme Court held:

> While the record indicated that the defendant suffered from mental illness, none of the experts could determine that the defendant was psychotic at the time of the murder. The court rejected the contention that being mentally ill necessarily indicated a defendant met one of the two requisite conditions of significant impairment outlined in (G)(1): being unable to appreciate the wrongfulness of his conduct; or the inability to conform to the requirements of the law.
>
> 1. The defendant's age was a close call considering the four factors outlined in *State v. Jackson* when considering age, 186 Ariz. 20, 30-31, 918 P.2d 1038, 1048-49: his intelligence was average, he did act immaturely and behaved impulsively and child-like, did commit the murder, and had a lengthy criminal history. The court deferred to the trial court and found that his age did merit some little mitigation.
> 1. His passive personality, impulsiveness and ease of being manipulated did warrant consideration for mitigation, but these were rendered negligible by his active participation in the murder.
> 1. Contrary to the trial court's holding, cost of the death penalty was not a mitigating factor. The cost was unrelated to the defendant's character or record or the circumstances of the case.
> 1. Length of time on death row, like the cost of the death sentence, was unrelated to the defendant's character or record or the circumstances of the case and therefore not a mitigating factor.
>
> The defendant's death sentence was affirmed.

State v. White, 297 Ariz. Adv. Rep. 29 (1999) - Prosecutor's opinion was relevant to sentence. The prosecutor's policy to seek death penalty where only one aggravating factor exists is within prosecutor's discretion.

The defendant was sentenced to death for killing his girlfriend's husband so she could collect the insurance. During its independent review, the Arizona Supreme Court [the court] considered the various mitigating factors offered by the defendant.

In its review, the court took exception with the trial court's statement that the former prosecutor's testimony was irrelevant. The prosecutor testified that the death penalty was inappropriate for this case which he classified as a "run of the mill" murder, but that he was bound by his office's policy. The trial court, in its special verdict, stated that the opinion of the prosecutor carried no weight and was irrelevant.

The court noted that it <u>was</u> relevant and should have been considered, especially in light of *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097 (1994). In that case, the court held "a recommendation of leniency from authorities who are intimately involved in a case carries significant weight and may constitute a mitigating circumstance." Other cases where authorities' recommendations for leniency have

been considered a mitigating factor are: *State v. Lee*, 185 Ariz. 549, 917 P.2d 692 (1996) (court considered prosecutor's comments as mitigating factor) and *State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989) (court considered probation officer's presentence report recommending against the death penalty). While the court emphasized that this recommendation should have been considered, it noted that this factor was insufficient to overcome the aggravating factor of financial gain.

The defendant also asserted that his ability for rehabilitation should have been given greater significance. As outlined in *State v. Rossi*, 154 Ariz. 245, 741 P.2d 1223 (1987) the "ability to be rehabilitated" can be considered a mitigating factor. Other cases include: *State v. Shad*, 163 Ariz. 411, 788 P.2d 1162 (1989), *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996), *State v. Stokley*, 182 Ariz. 505, 898P.2d 454 (1995), and *State v. King*, 180 Ariz. 268, 883 P.2d 1024 (1994). However, in those cases, the defense offered expert testimony. In this matter, the defendant testified. It is not sufficient.

The court declined to accept the defendant's contention that "aberrant behavior" should be considered in Arizona as it is in federal courts to be a mitigating factor.

In rejecting the defendant's mitigating factor of disparate sentence (the victim's wife was sentenced to life imprisonment), the court observed the defendant actually killed the victim and a number of other factors that supported a less severe sentence for the co-defendant.

The court also noted that while it was the Yavapai County Attorney's Office policy to seek the death penalty in any first degree murder case where only one aggravating factor exists, it was within the bounds of prosecutorial discretion to hold to such a policy. This is especially true since the actual sentencing decision rests with the trial court.

Chief Justice Zlaket and Justice Feldman dissented from the majority's holdings. They contented that the prosecutor's comments should have held sway with the court, especially in view of the county prosecutor's policy on death penalty cases. They did not see this as an appropriate case for the death penalty.

State v. Wagner, 296 Ariz. Adv. Rep. 22 (1999) - Sentencing guidelines are not required when imposing the death penalty.

The defendant was convicted of first degree murder and armed robbery and sentenced to natural life. He appealed his convictions and sentence arguing that A.R.S. §13-703.A is unconstitutionally vague because it does not provide sentencing guidelines for a judge to use in deciding whether to impose a life sentence or a natural life sentence and therefore permits arbitrary enforcement of the law.

The court of appeals summarily rejected the defendant's claim that the sentencing statute was vague and required guidelines. Next, relying on *Britton v. Rogers*, 631 F.2d 572 (8th Circ. 1980), the court of appeals went on to apply the three *Mathews v. Eldridge*, 424 U.S.319, 96 S. Ct. 893 (1976) factors to determine if defendant had a due process right to sentencing guidelines. They determined that he did not. The convictions and sentences were affirmed.

During its subsequent review, the Arizona Supreme Court agreed with the court of appeals and concluded that A.R.S. §13-703.A was not vague. "Arizona's statute [A.R.S. §13-702.A] . . . states with clarity that punishment for committing first degree murder is either death, natural life, or life in prison without the possibility of parole. Thus, a person of ordinary intelligence can easily determine the range of punishment he or she faces for committing first degree murder."

The Arizona Supreme Court went on to hold that the *Mathews* approach did not apply to constitutional challenges to criminal sentencing procedures. That part of the court of appeals opinion was

vacated.

State v. Wooten, 294 Ariz. Adv. Rep. 3, 972 P.2d 993 (1999) - Sentencing guidelines are not required when imposing the death penalty.

Among other issues argued in this appeal was a challenge to A.R.S. §13-703, sentencing in first degree murder cases. The court of appeals, referring to *State v. Guytan* 266 Ariz. Adv. Rep. 10 (App. Apr. 7, 1998), found that the absence of statutory guidelines to channel the court's discretion in choosing between life and natural life does not render them unconstitutional.

State v. Sharp, 288 Ariz. Adv. Rep. 36 (1999) - Self-reported evidence may be given little or no mitigating weight. A causal connection must be presented to justify considering evidence of a defendant's background as a mitigating factor. Police negligence in not entering the room sooner and, perhaps saving the victim's life, was not considered a mitigating factor.

The defendant was sentenced to death for killing the motel manager who brought him extra towels when he requested them. The Arizona Supreme Court reviewed the conviction and upheld the sentence, finding that the defendant had killed the victim in a especially cruel manner due to the physical and mental pain she suffered while she was sexually assaulted and murdered and no factors sufficient to mitigate this sentence.

While the defendant presented a number of mitigating factors, the court found them unpersuasive. The defendant presented two psychologists who testified the defendant may have been in a state of agitated delirium, a condition in which a person dissociates from reality and experiences diminished cognitive function. However, the evidence that the defendant tried to conceal the crime negated this testimony for the trial court. While the defendant offered that he did not appreciated the wrongfulness of his action as a result of a traumatic childhood, the evidence was solely self-reported and failed to show a causal connection between his childhood trauma and the murder. The court has consistently held that self-reported evidence may be given little or no mitigating weight, *State v. Murray*, 184 Ariz. 9, 45, 906 P.2d 542, 578 (1995), and a causal connection must be presented to justify considering evidence of a defendant's background as a mitigating factor. *State v. Rienhardt*, 190 Ariz.. 579, 592, 951 P.2d 454, 467 (1997) and *State v. Jones*, 185 Ariz. 471, 490-91, 917 P.2d 200, 219-20 (1996). The defendant's age, 24, was not a mitigating factor. Police negligence in not entering the room sooner and, perhaps saving the victim's life, was not considered a mitigating factor as the defendant requested.

State v. Doerr, 282 Ariz. Adv. Rep. 14 (1999) - Mitigating factors must be connected to the murder in order to be relevant.

The defendant was convicted of first degree murder, sexual assault, and kidnapping. The trial judge found the heinous, cruel, or depraved aggravating factors and insufficient mitigation to warrant leniency. He was sentenced to death.

As part of his appeal, the defendant claimed an "in life" photograph prejudiced the jury. While

the Arizona Supreme Court found the photo did not provide much assistance to the jury in deciding the case, it was unwilling to adopt an inflexible rule that "in life" photos are always inadmissible in homicide cases and opted to leave it to the trial court to balance the probative value of the photo against the risk of unfair prejudice.

In reviewing the sentencing issues, the court concurred that the crime was cruel, heinous and depraved based upon the victim's suffering, the defendant's statement to his cellmate about playing with the victim's blood, the mutilation he inflicted upon her body, and the gratuitous violence he invoked upon her.

In mitigation, the defense provided speculative opinions of three doctors who hypothesized that the defendant might have brain damage (despite the fact that a CATSCAN revealed none). These witnesses failed to establish that, if the defendant did have organic brain damage, it impaired his ability to control his conduct. The court agreed with the trial court's finding that the defendant did not prove that organic brain damage impaired his capacity as required by A.R.S. §13-703(G)(1).

The defendant claimed that his cooperation with the police should have been considered as a mitigating factor. The trial court concluded that the defendant was motivated by self interest and not any concern for the victim. While the defendant may have had an abusive childhood, the defense provided no connection between it and the crime. While the defendant had a low average IQ, the defense did not provide any connection between it and his ability to know right from wrong and the murder. The court found the trial court properly weighed both the aggravating and mitigating factors.

State v. Greene, 280 Ariz. Adv. Rep. 21 (1998) - History of substance abuse is not a mitigating factor if there is no evidence establishing a causal connection between the drug abuse and the crime. a dysfunctional family history, lack of a felony record, educational achievement, being an adequate family member, periods of gainful employment, past good conduct and character, the effect the defendant's execution would have on his children all may be considered mitigating factors.

The defendant was sentenced to death for murder. The trial court found the murder was committed for pecuniary gains and was committed in an especially heinous, cruel or depraved manner. In its review, the Arizona Supreme Court agreed that the defendant murdered the victim for pecuniary gain. However, it did not find that the evidence supported a finding of relishing the murder, therefore "the (F)(6) aggravator could not stand, because senselessness and helplessness, without more, are ordinarily insufficient to prove heinous or depravity." See *State v. Ross*, 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994).

In his appeal, the defendant disagreed with the trial court's finding that his withdrawing from drugs should not have been considered as mitigation, as it impaired his ability to appreciate the wrongfulness of his conduct. The Arizona Supreme Court agreed with the trial court that the defendant's behavior following the murder did not support this contention. The court went on to review the following additional mitigation factors:

> **Drug use and withdrawal**- in *State v. Jones*, 185 Ariz.471, 491, 917 P.2d 200, 220 (1996) the court gave some weight to a history of alcoholism or drug abuse. However, in the present matter, the defendant testified that he was not under the influence of drugs at the time of the killing. As in *State v. Rienhardt*, 190 Ariz. 579, 592, 951 P.2d 454, 467 (1997) the court will reject history of substance abuse if there is no evidence establishing a causal connection

between the drug abuse and the crime, the court did not find this to be mitigating.

Dysfunctional Family History - The court has held that "family background may be a substantial mitigating circumstance when it is shown to have some connection with the defendant's offense-related conduct." *State v. Towery*, 186 Ariz.168, 189, 920 P.2d 290, 311 (1996). In this matter, it was true the defendant's mother introduced the defendant to drugs, however, as an adult, the defendant had to show how that affected his criminal behavior. See *State v. Stokeley*, 182 Ariz. 505, 524, 898 P.2d 454 473 (1995). The court did not find this to be a mitigating factor.

The defendant's **lack of a felony record** was appropriately found to be a mitigating factor with little weight.

While **educational achievement** can be a slight mitigating factor, see *State v. Hensley*, 142 Ariz. 598, 604, 691 P.2d 689, 695 (1984), the defendant's achievements did not overcome the aggravating factor.

While the defendant was married and completed trade school and was employed, once he divorced, he failed to pay child support and his rights were severed. In *State v. Stanley*, 167 519, 529, 809 944, 954 (1991) the court found that being an **adequate family member** was mitigating. However, where the defendant fails to maintain minimal contact with his children, there is no mitigating factor. See *State v. West*, 176 Ariz. 432, 451, 862 P.2d 192, 211 (1993). In this matter, the court rejected this claim of mitigation. Periods of **gainful employment** may be mitigating factors, *State v. Soto-Fong*, 187 Ariz. 186, 211, 928 P.2d 610, 635 (1996). The defendant in this matter was unemployed at the time of the crime. The court rejected this as mitigating.

Past good conduct and character can be considered a relevant mitigating factor, *State v. Williams*, 183 Ariz. 368, 384, 904 P.2d 437, 454 (1995); however, a single good deed, removed in time from the crime does not provide a mitigating factor, *State v. Willoughby*, 181 Ariz. 530, 549, 892 P.2d 1319, 1338 (1995). The defendant's interaction with his younger brother did not qualify as a mitigating for the defendant.

The court gave some mitigating weight to the **effect the defendant's execution would have on his children** in accordance with *State v. Maturana*, 180 Ariz. 126, 135, 882 P.2d 933, 942 (1994).

Because the aggravating factor of pecuniary gain so outweighed the mitigating factors, the Arizona Supreme Court affirmed the conviction and sentence.

Chief Justice Zlaket and Judge Kleinschmidt dissented. They did not find that this crime was more than a "robbery gone awry" murder that did not warrant the death sentence. In particular, they objected to the sole pecuniary gain aggravating factor as the basis for the majority's holding. They preferred to follow "the principle that if there was doubt about whether the death penalty should be imposed, we will resolve in favor of a life sentence." *State v. Marlow*, 163 Ariz. 65, 72, 786 P.2d 395, 402 (1989).

State v. Schackart, 947 P.2d 315 (1997) - The Supreme Court will not take judicial notice of prior conviction in death penalty case

The Arizona Supreme Court declined to take judicial notice of the defendant's prior conviction after the state filed a "Request to Take Judicial Notice." In its decision, the court held that it was " . . . ill-equipped to resolve disputes over authenticity [of the prior conviction]. Thus, the customary way to prove a prior offense is by introducing appropriate documentary evidence in the trial court . . . We see no reason to depart from this procedure, especially where life or death might literally hang in the balance."

State v. Lee (I), 944 P.2d 1204, (1997) - Simultaneous or previous convictions entered prior to a sentencing hearing may be considered regardless of the order in which the underlying crimes occurred or the order in which the convictions were entered may be used as aggravating factors.

The defendant was sentenced to death after being found guilty of shooting and killing a pizza delivery woman and a cab driver. Among other issues discussed by the Arizona Supreme Court during its review, the court reiterated its finding in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), that the court may consider simultaneous convictions for murder as an aggravating factor:

> We have held that our death penalty statute is not a recidivist or enhancement statute, the purpose of which is to serve as a warning to convicted criminals and encourage their reformation. Rather, '[w]e have stated that the purpose of an aggravation/mitigation hearing is to determine the character and propensities of the defendant . . . .' Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred or the order in which the convictions were entered.

State v. Mann, 934 P.2d 784 (1997) - Victims' families recommendations are not to be considered in sentencing.

The defendant was sentenced to death after being found guilty of shooting and killing two people during a drug rip-off. The Arizona Supreme Court concurred that the offense was cruel because one of the victims was conscious three to five minutes according to a witness. Although the coroner testified the victim probably died within seconds, the trial judge found the witness' testimony more persuasive.

Although the original plan for the murder involved only the first victim, the second was killed when he unexpectedly accompanied the first victim. Since pecuniary gain motivated the first killing, "stealing the money was the 'motive, cause, or impetus,' for the murders of both [victims]." The pecuniary gain aggravator also applied to the second murder.

The defendant claimed the letters sent directly to the judge from the victims' family members and friends were ex parte communications. Again, the supreme court emphasized that the trial court was to ignore irrelevant sentencing factors such as the victims' families recommendations. The record in this case supported the trial judge found aggravating factors "solely on the evidence adduced at trial."

The supreme court upheld the trial court's ruling that the non-statutory mitigators did not outweigh the three statutory aggravating factors the court found.

State v. Rogovich, 932 P.2d 794 (1997)

In this death penalty review, the supreme court confirmed that the conviction needed to support the (F)(1) aggravation factor (other conviction for which life imprisonment or death was imposable) did not have to be outside Arizona. The broader interpretation that the conviction can be internal or external to Arizona is correct. The supreme court went on to confirm the trial court's sentences.

State v. Lacy, 929 P.2d 1288 (1996) - A mere possibility the defendant exhibited reckless indifference is insufficient to impose the death penalty.

The defendant was owed some money by co-defendant Stubblefield. Stubblefield indicated he knew a woman who would give him some chemicals to make angel dust, which he would sell to repay the debt. Using a key Stubblefield had, they entered the victims' apartment. When the first woman refused to give Stubblefield the chemicals, he struck her. Her roommate came in and swung at Stubblefield with a wrench. He shot her.

The defendant claimed to be in the kitchen during this fight, and tried to run when the gun went off. He saw Stubblefield shoot the second woman in the face. At this point, the defendant saw a microwave oven and picked it up and ran out the door. When Stubblefield did not come out, he returned to the apartment. Upon entering, he saw that Stubblefield had tied up the first woman and watched as he shot her in the head. The defendant ran from the apartment.

Over eight years later, the defendant and Stubblefield were charged with the murders and burglary. Stubblefield was acquitted by a jury which did not hear the defendant's statements because they were ruled inadmissible. The defendant was found guilty of felony murder and sentenced to death. In sentencing the defendant to death, the court found two aggravating factors, heinous and cruel; and multiple victims.

In reviewing the case, the Arizona Supreme Court noted that a defendant is death-eligible only if he killed, attempted to kill, or intended that a killing take place. *Enmund v. Florida*, 458 U.S. 782 (1982). This rule was broadened in *Tison v. Arizona*, 481 U.S. 137 (1987), where it was decided that the *Enmund* requirement was met if the defendant was a major participant in the underlying felony and acted with reckless indifference to life. In sentencing the defendant to death, the trial court found the defendant to be a definite major involvement in the victims' deaths. However, nowhere did the court find the defendant killed, attempted to kill or intended to kill the victims. Therefore, the trial court would have to find a determination under *Tison* in order to impose the death penalty.

The state argued that since the defendant stood by and did nothing to help the victims, he met this requirement. However, the supreme court noted that in almost every felony murder case, the defendant fails to render aid or call for help for the victim. "There must be something more if the concept of 'reckless indifference' is to provide any meaningful guidance for determining which defendants should suffer the ultimate penalty."

The supreme court went on to explain that ". . . it is problematic to conclude beyond a reasonable doubt that a defendant exhibited reckless indifference when there are multiple suspects, no eyewitnesses, and minimal physical evidence." In this case, the defendant's fingerprints were not found in the house, it was unclear if he knew Stubblefield had a gun, and it was uncertain whether he should have anticipated violence. "While a risk of bloodshed may exist during the commission of any felony, mere participation in a crime resulting in a homicide is not enough to warrant imposition of the death penalty." *Jackson v. Florida*, 575 So. 2d 181 (Fla. 1991). A mere possibility that the defendant

exhibited reckless indifference is insufficient to impose the death penalty.

For this reason, and that fact that only one aggravating factor remained after the supreme court's independent review, the supreme court reduced the defendant's sentences to life imprisonment to be served consecutively.

State v. Soto-Fong, 928 P.2d 610 (1996) - Crime was not committed in an especially heinous, cruel, or depraved fashion, nor did the victims suffered mental cruelty.

The seventeen-year-old defendant and two adults were charged with the armed robbery and murder of a store owner and two friends. The defendant was convicted and sentenced to death.

In its review, the Arizona Supreme Court set aside the trial court's finding that the murders were committed in an especially heinous, cruel, or depraved fashion. Referring to *State v. Gretzler*, 135 Ariz. 42 (1983), the supreme court noted that all murders are not especially cruel by citing as examples *State v. Ortiz*, 131 Ariz. 195 (1981); *State v. Bishop*, 127 Ariz. 531 (1981); *State v. Clark*, 126 Ariz. 428 (1980); and *State v. Ceja*, 126 Ariz. 35 (1980). As in the cases cited, the evidence in this case was inconclusive that the victims suffered before becoming unconscious. The supreme court followed "the implicit rule of *Ortiz*, *Bishop*, and *Ceja*, that where shots, stabbings, or blows are inflicted in quick succession, one of them leading rapidly to unconsciousness, a finding of cruelty, *without any additional supporting evidence*, is not appropriate." Similarly, the supreme court found that the evidence precluded them from finding that the victims suffered mental cruelty before their deaths.

Citing *State v. Amaya-Ruiz*, 166 Ariz. 152 (1990); *State v. Comer*, 165 Ariz. 413 (1990); *State v. Ceja*, 126 Ariz. 35 (1980); *State v. Brookover*, 124 Ariz. 38 (1979); *State v. Watson*, 120 Ariz. 441 (1978); and *State v. Blazak*, 131 Ariz. 598 (1982), the supreme court did not find these murders to be instances of gratuitous violence. The Arizona justices also did not find these murders to represent instances of witness elimination. However, the court did find that the evidence supported the aggravating factors of pecuniary motive and multiple homicides.

The defendant's age was considered as a mitigating factor. His close family ties, lack of an adult record, employment history, and behavior at trial were reviewed and considered not to be mitigating factors that outweighed the aggravating factors. Both the convictions and sentences were affirmed.

State v. Miller, 921 P.2d 1151 (1996)

In its review of the defendant's death sentence, the Arizona Supreme Court held that the defendant's "intoxication did not impair his ability to conform his conduct to the law or his appreciation of the wrongfulness of his conduct. As we said in *State v. Kiles* [175 Ariz. 358 (1993)], '[w]e refuse to equate defendant's *unwillingness* to control his actions with an *inability* to do so.'" The Arizona Supreme Court went on to address the co-defendant's plea and sentence to life imprisonment. A difference in sentences between co-defendants through appropriate plea bargaining is not mitigating. *State v. Stokley*, 182 Ariz. 505 (1995).

State v. Gallegos, 916 P.2d 1056 (1996)

In reviewing the defendant's death sentence, the Arizona Supreme Court noted that although the defendant proved a history of substance abuse, this mitigating factor was reduced by his failure to act to resolve the problem or to benefit or seek treatment during his period of probation.

State v. Jackson, 918 P.2d 1038 (1996)

In this death sentence review, the Arizona Supreme Court upheld imposing the death penalty for a 16-year-old. In a special concurrence, Chief Justice Feldman noted his reluctance to impose the death penalty on 16-year-olds, but the crime in this matter was so senseless that not to impose the death penalty because of the defendant's age "is to say we will never impose the death penalty on a sixteen-year-old defendant."

State v. Mata, 916 P.2d 1035, (1996)

The Arizona Supreme Court held that cases in which the trial court sentenced the defendant to death based upon a finding of "especially heinous, cruel, or depraved" prior to the opinion in *State v. Gretzler*, 135 Ariz. 42 (1983) do not need to be resentenced.

State v. Miller, 921 P.2d 1151 (1996)

In its review of the defendant's death sentence, the Arizona Supreme Court held that the defendant's "intoxication did not impair his ability to conform his conduct to the law or his appreciation of the wrongfulness of his conduct. As we said in *State v. Kiles* [175 Ariz. 358 (1993)], '[w]e refuse to equate defendant's *unwillingness* to control his actions with an *inability* to do so.'" The Arizona Supreme Court went on to address the co-defendant's plea and sentence to life imprisonment. A difference in sentences between co-defendants through appropriate plea bargaining is not mitigating. *State v. Stokley*, 182 Ariz. 505 (1995).

State v. Spears, 908 P.2d 1062 (1996) - The family's funeral and travel expenses, and the 'customary and reasonable' attorney's fees incurred to close the victim's estate are proper restitution items.

The defendant was convicted by a jury of first degree murder and theft and sentenced to death. As part of the automatic review, the Arizona Supreme Court held that the trial court did not err in ordering restitution without a hearing for the victim's family's expense which included phone, probate attorney's fees, tax preparation fees, and funeral-related costs. "We believe that the family's funeral and travel expenses, and the 'customary and reasonable' attorney's fees incurred to close the victim's estate are proper restitutionary items."

The Arizona Supreme Court also reviewed the case for mitigating sentencing factors. The defendant was 33, so age was not a mitigating factor. The defendant's lack of a prior criminal history was appropriately considered as a mitigating factor. The defendant's difficult family background was

given minimal weight. Support by his mother did not translate into a mitigating factor. His spotty employment record was correctly not considered while his military history had some mitigating value. Good conduct in court and while incarcerated did not have to be considered. Cooperation with law enforcement was properly not considered. The defendant's conviction was affirmed.

State v. Walden, 201 Ariz. Adv. Rep. 3 (1995)

The defendant was found guilty of murder, sexual assault, sexual abuse, aggravated assault, kidnaping, burglary, and robbery. He was sentenced to death and prison. As part of the mandatory appeal, the Arizona Supreme Court found the murder was especially cruel since the victim was conscious during her attack, Walden committed the murder in an especially heinous or depraved manner because the victim was helpless, the murder was senseless, and Walden inflicted gratuitous violence. The Arizona Supreme Court did not uphold the finding that the victim was killed to eliminate a witness according to the standards established by *Ross*, 180 Ariz. 598 (1994). The Arizona Supreme Court concurred with the trial court that the defendant's mitigating factors of abusive childhood, model prisoner, age, and unhappy life experiences were not sufficiently substantial to call for leniency. The sentences were affirmed.

State v. Gulbrandson, 906 P.2d 579 (1995)

The defendant was convicted of murdering his former girlfriend and business partner. She had suffered 34 stab wounds and other injuries. The pathologist believed most of the injuries were inflicted before her death which resulted from a punctured liver.

On appeal, the Arizona Supreme Court reviewed the following sentencing issues. Although the victim's family requested the death penalty, the Arizona Supreme Court could find no indication in the record that the trial court had given any weight to these "irrelevant, inflammatory, and emotional" statements in accordance with *Bolton*, 896 P.2d 830 (1995). The Arizona Supreme Court found no support that the trial court's holding the sentencing hearing on both the capital and noncapital offenses together provided inadmissible and prejudicial information.

Noting that a finding of senselessness or helplessness alone will not usually support a finding of especially heinous or depraved (*Gretzler*, 135 Ariz. at 52-53), the Arizona Supreme Court reviewed other *Gretzler* factors to determine if any one of them existed to combine with helplessness. Although the defendant gambled the day after the murder, it did not prove the defendant relished the murder. Because of the nature and extent of the victim's wounds, the Arizona Supreme Court found beyond reasonable doubt that the defendant inflicted gratuitous violence on the victim. The victim's helplessness was also proven beyond a reasonable doubt.

In mitigation, the trial court found the defendant was under unusual stress, had a character or behavior disorder, suffered physical and emotional abuse from ages four to twelve, and demonstrated good character while incarcerated. The Arizona Supreme Court found no reason to consider the defendant's remorse or the support of third parties as relevant mitigating factors. In summary, the Arizona Supreme Court concluded the death penalty was the appropriate sentence.

State v. Murray, 906 P.2d 542 (1995)

The defendant and his brother were convicted of the shooting deaths of a 65-year-old man and 60-year-old woman and stealing money from their store. The trial court concluded the killings were committed for pecuniary gains; were especially cruel since the victims were killed execution-style causing the victims to experience physical or mental pain and suffering prior to dying; were heinous and depraved since they involved gratuitous violence, helplessness, senselessness; and involved victim-elimination. The Arizona Supreme Court dismissed this last factor as aggravating in accordance with *Ross*, 180 Ariz. 598 (1994) and *Barreras*, 181 Ariz. 516 (1995). The Arizona Supreme Court rejected the defendant's argument that it was inappropriate to consider the multiple homicides as aggravating since it would constitute double jeopardy.

In mitigation, the defendants offered minor participation (unproven), intoxication (unproven), no threat to society (did not qualify), potential for rehabilitation (proven), dysfunctional childhood (unproven), nonviolent criminal history (unproven), juvenile experiences impaired his capacity to appreciate the wrongfulness of his conduct (unproven), head injuries (unproven), hyperactivity and impulsivity (while proven did not show that his ability to control his actions was substantially impaired), age (unproven), duress (unproven), would not be a grave risk (unproven), medical treatment (unproven), remorse (unproven), education (unproven), and cooperative (unproven).

State v. Williams, 909 P.2d 472 (1995)

The defendant was found guilty of murdering his former girlfriend and attempting to kill a Circle K clerk and robbing her. He was sentenced to death on the first charge. In its review, the Arizona Supreme Court confirmed the trial court's use of the attempted murder conviction as an aggravating factor in addition to its especially heinous or depraved aggravation. The Arizona Supreme Court agreed with the use of "no prior record" and "past good behavior and character" as mitigating factors and dismissed as mitigating factors: drug use, duress, the victim as the initial aggressor, the victim's family request for life imprisonment, defendant's strong family ties, age, and race. The Arizona Supreme Court affirmed the convictions and sentences.

In a special concurrence, Chief Justice Feldman emphasized that "the survivors' recommendations on the 'appropriate sentence is not relevant to any of our statutory aggravating factors'." He noted that in its review, the Arizona Supreme Court has always assumed that the trial court does not weight these factors " . . . but one must wonder how accurate such an assumption may be. The sentencing decision in many capital cases is difficult enough without subjecting the trial judge to the emotional pressure of listening to the victims' understandable but legally inadmissible recommendations, often motivated by the need for catharsis and sometimes by the desire for revenge . . . We must decide cases according to law and logic, not emotion . . . I believe the time is near for the court to take a position forbidding the introduction of evidence calculated to influence the sentencing judge in a manner forbidden by the law. It should not be offered by the prosecution or permitted by the court."

State v. Bolton, 192 Ariz. Adv. Rep. 49 (1995)

The defendant was convicted of burglary, kidnaping and murder of a three-year-old girl taken

from her bedroom. He received the death sentence for the murder charge. On appeal to the Arizona Supreme Court, the court ruled on a number of issues including the following aggravating and mitigating factors. The Arizona Supreme Court held that the trial court had not counted the victim's age twice in its consideration of A.R.S. § 13-703(F)(9) [victims under the age of 15], and 13-703(F)(6) [especially heinous, cruel, or depraved]. The Arizona Supreme Court next considered the issue of "heinous, cruel, or depraved." A murder is especially cruel if the victim consciously experiences physical abuse or mental anguish before death. *State v. Lopez*, 175 Ariz. 407, 857 P.2d 1261 (1993). To support a finding of cruelty, the state must prove beyond a reasonable doubt that the victim was conscious and suffered pain or distress at the time of the offense. *State v. Jimenez*, 165 Ariz. 444, 799 P.2d 785 (1990). If the evidence is inconclusive as to whether the victim was conscious during the infliction of violence, the court may not find that the killing was especially cruel. *State v. Gillies*, 142 Ariz. 564, 691 P.2d 655 (1984). The Arizona Supreme Court concluded that the state proved beyond a reasonable doubt that the murder was especially cruel.

The Arizona Supreme Court next reviewed the mitigating factors. The sentencing judge must consider " . . . any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether a sentence less than death might be appropriate." *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983). Defendant must establish mitigating factors by a preponderance of the evidence. *State v. Fierro*, 166 Ariz. 539, 804 P.2d 72 (1990). The trial court has discretion in deciding how much weight to give to the mitigating factors that the defendant offers. *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992). On appeal, the Arizona Supreme Court will review the record independently to determine the existence or absence of aggravating and mitigating circumstance. *State v. Gillies,* 135 Ariz. 564, 691 P.2d 655 (1984).

The Arizona Supreme Court concluded that the trial court had considered all the mitigating factors presented, but had hoped to see a more extended explanation. As pointed out in *State v. Leslie*, 147 Ariz. 38, 708 P.2d 719 (1985) and more recently in *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097 (1994) a better practice is for the trial court to place on the record a list of all factors offered by a defendant in mitigation and then explain the reason for accepting or rejecting them.

Proceeding to their independent review, the Arizona Supreme Court considered seven mitigating factors. Based upon the psychological evaluations offered by the defendant, the Arizona Supreme Court did not find impaired capacity to conform his conduct to the requirements of the law to be a mitigating factor. The defendant's severe emotional and physical abuse as a child would be relevant only if a defendant can show that something in that background had an effect or impact on his behavior that was beyond his control. *State v. Wallace*, 160 Ariz. 424, 773 P.2d 983 (1989). The Arizona Supreme Court did not find these crimes to be impulsive and beyond his control. The defendant's age of 19 had little mitigating value. The remaining mitigating factors were dismissed as unproven.

Lastly, the defendant argued that the admissions of the victim's statements at sentencing violated his right to due process and his right against infliction of cruel and unusual punishment. "We acknowledge that family testimony concerning the appropriate sentence may violate the constitution if presented to a capital sentencing jury. . . . We also acknowledge that victim impact testimony is not relevant to any of our statutory aggravating factors. *State v. Atwood*." In this matter, the judge expressly stated on the record that he would consider the parents' statements only in connection with the noncapital counts. "Absent evidence to the contrary, we have assumed that the trial judge in a capital case is capable of focusing on the relevant sentencing factors and setting aside the irrelevant, inflammatory, and emotional factors." The conviction and sentence were affirmed.

State v. Barreras, 892 P.2d 852 (1995)

The defendant pled no contest to killing and sexually assaulting a mentally impaired 19-year-old women. The trial court sentenced the defendant to death, finding the murder was committed in an especially heinous or depraved manner. The trial court relied upon the definitions in *State v. Gretzler*, 135 Ariz. 42 (1983) rather than those in *State v. Knapp*, 114 Ariz. 531 (1977). Under *Gretzler*, the Arizona Supreme Court consider five factors to determine if a murder was especially heinous or depraved: 1) relishing the murder, 2) inflicting gratuitous violence, 3) mutilating the victim, 4) the senselessness of the murder, and 5) the helplessness of the victim. The first three factors are given the most weight. In *State v. Ross*, 886 P.2d 1354, the Arizona Supreme Court also identified witness elimination as an additional aggravating factor.

In this matter, the trial court based its finding on the senselessness, helplessness, and witness elimination factors. The Arizona Supreme Court agreed with the senselessness of the crime and the helplessness of the victim. However, it could not find support for the witness elimination factor. If the murder was senseless, it could not have been committed to eliminate a witness, which makes sense. Moreover, witness elimination is applicable only if: 1) the victim witnessed another crime and was killed to prevent testimony about that crime, 2) a statement by the defendant or evidence of his state of mind shows witness elimination was a motive, or 3) some extraordinary circumstances show the murder was motivated by a desire to eliminate witnesses. *Ross*, 886 P.2d at 1362. In this case, the victim did not witness any other unrelated crime and the defendant did not say anything to show witness elimination was his motive.

"We are left with only the last two *Gretzler* factors--senselessness and helplessness. As noted, we have held that in most cases the senselessness and helplessness factors alone will not support a finding of heinousness or depravity. *Ross* at 1362; *State v. Brewer*, 170 Ariz. 486. Although the question is close, we conclude here that they do not support a finding beyond a reasonable doubt that the murder was especially heinous or depraved within the meaning we have given these terms." *State v. Milke*, 177 Ariz. 118.

"The facts of this case tempt us to expand the meaning of heinous and depraved, but to do so on a case-by-case basis would institute a regime of ad hoc sentencing, destroying the definitional consistency that preserves the constitutional validity of our sentencing process . . . If we could expand the meaning of the (F)(6) factors' broad language to encompass the facts of each case on the basis of our intuitive conclusions as to the proper penalty, we would indeed have abandoned the struggle to provide a consistent narrowing definition and conceded that the factor is unconstitutionally vague. We must therefore set aside the trial judge's finding that the heinous or depraved aggravating circumstance applies."

State v. Ross, 886 P.2d 1354 (1994)

The defendant was convicted of first degree murder and sentenced to death. On appeal, the Arizona Supreme Court could not substantiate the aggravating factor that the defendant killed the victim to eliminate a witness. During its review of the mitigating factors, the court reiterated that a difficult family background is not a relevant mitigating circumstance unless " . . . a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." *State v. Walker*, 160 Ariz. 424. Although the court invalidated one of the two aggravating

factors supporting the death sentence, it affirmed that sentence upon reweighing the evidence.

State v. Richmond, 886 P.2d 1329 (1994)

In 1974, the defendant was sentenced to death after the trial court found aggravating factors and no statutory mitigating factors. The judge believed at the time the law did not permit his consideration of non-statutory mitigating factors. In 1978, pursuant to *State v. Watson*, 120 Ariz. 441 which held that it was unconstitutional to restrict mitigating circumstances to those enumerated by statute, the death sentence was vacated. On remand, the defendant again was sentenced to death. Although divided on the issues, the Arizona Supreme Court affirmed the death sentence in 1983. The U. S. Supreme Court subsequently directed the Arizona Supreme Court to correct a constitutional error in the defendant's second death sentence or impose a lesser sentence. That error involved the trial court considering an unconstitutionally vague aggravating factor.

The Arizona Supreme Court concluded it should conduct the reweighing of the sentencing factors rather than send it back to the trial court. This was based upon a belief that if the defendant were sentenced to death again by the trial court, the next appeal process would occur almost three decades after the crime which could be considered cruel and unusual punishment.

In reweighing the factors, the Arizona Supreme Court concluded the defendant had become a changed person in prison. He had taught himself to read, write and type and gained spiritual growth to help others. These factors outweighed the aggravating factors. Based upon this review, the court reduced the sentence to life which was to be served consecutive to a prior life sentence.

State v. Vickers, 885 P.2d 1086 (1994)

The defendant was convicted of first degree murder of his cellmate. On an automatic appeal to the Arizona Supreme Court, the court addressed the issues of effective assistance of counsel and destruction of all physical evidence. Relying heavily upon the state's pre-trial motion to determine effective counsel, the court concluded that the defense attorney's " . . . performance fell outside the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668. The court found that " . . . there is more than a mere possibility that the outcome of the defendant's trial would have been different but for [the counsel's] errors." The court went on to conclude the destruction of the physical evidence was not the result of bad faith conduct and no basis for appeal. However, because the court found the defendant was denied effective assistance of counsel, the conviction and sentence were reversed.

In a strongly worded dissent, Justice Martone provided remarks " . . . so that mistakes will not be repeated on retrial and so that trial judges in other cases will have some guidance on what to do when confronted by a plainly ineffective lawyer." In his opinion, when presented with undisputed evidence of ineffective assistance, a trial judge must remove counsel and substitute adequate counsel. The judge should make the appropriate record to protect against claims that he or she interfered with the defendant's choice of counsel.

State v. Stuard, 152 Ariz. Adv. Rep. 21 (1993)

The defendant was convicted of three counts of first degree murder of elderly women and sentenced to death. As part of the automatic appeal, the Arizona Supreme Court reviewed the matter and reduced the sentences to life. The Arizona Supreme Court concurred with the trial court's finding that the defendant's prior conviction and the heinous and cruel manner of the deaths were aggravating factors, but held that the trial court had not given sufficient weight to the defendant's mental impairment at the time of the crimes. The Arizona Supreme Court held that this was " . . . a major contributing cause of his conduct" and was sufficiently substantial to outweigh the aggravating factors. Justice Martone dissented.

State v. Robinson, 796 P.2d 853 (1990)

Tying up an elderly couple, making them lie down and shooting them was heinously cruel. The defendant's age of 27 and his single parent status were not mitigating.

State v. Lopez, 786 P.2d 959 (1990)

With respect to the death penalty, resisting arrest does not qualify as a statutory aggravating factor under A.R.S. § 13-703(F)(2) because it could be committed without using or threatening violence. Intoxication, by itself, does not constitute mitigation.

State v. Rossi, 154 Ariz. 245 (Ariz. 1987)

The defendant was sentenced to death. On appeal, the Arizona Supreme Court concluded that the defendant proved by a preponderance of the evidence that he could be rehabilitated. It also concluded the defendant proved by a preponderance of the evidence that his cocaine addiction significantly impaired his capacity to conform his conduct to the requirements of the law. The matter was remanded for sentencing , at which time the trial court would consider these two mitigating factors.

State v. McMurtrey, 136 Ariz. 93 (Ariz. 1983)

The defendant was convicted of two murders and one attempted murder. Although the trial court considered the evidence presented by the defense concerning the defendant's mental state, the court did not consider it a mitigating factor.

On appeal, the Arizona Supreme Court remanded the case for resentencing because it did not feel the trial court had considered this factor sufficiently. "If after considering the offered evidence, the court concludes that, with respect to the defendant's mental condition, it merely established a character or personality disorder then the court may, under *Richmond*, [114 Ariz. 186 (1977)] conclude that the mitigating circumstance in Sec. 13-703(G)(1) does not exist. In order to remain faithful to *Lockett* [438 U.S. 586 (1978)] and *Watson* [120 Ariz. 441 (19780], however, the court's inquiry may not end there. The court must consider the offered evidence further to determine whether it in some other way suggests that the defendant should be treated with leniency. . . . In this instant case there is some indication that the trial court did not follow this approach."

State v. Watson, 129 Ariz. 60 (Ariz. 1981)

The Arizona Supreme Court set aside the death penalty and imposed life imprisonment after finding the following mitigating factors outweighed the aggravating factors: the defendant had been a model prisoner, he attempted to further his education, his age, the fact that the victim shot first, and that the codefendant received a life sentence rather than death.

Client and Attorney Conflict

State v. Moody, 282 Ariz. Adv. Rep. 11 (1999)

The defendant was convicted of two counts of first degree murder. On review by the Arizona Supreme Court, the convictions and sentences were reversed. The defendant wished to present a "space alien" defense which the defense counsel refused to follow. The trial court refused a change of counsel despite a record "replete with examples of deep and irreconcilable conflict."

Post-Conviction Relief

State v. Brown (Miles), 297 Ariz. Adv. Rep. 5 (1999)

In a special action, the state asked the Arizona Supreme Court to reverse the trial court's finding that the legislation reducing the time periods for post-conviction were unconstitutional. The state contended that it was within the legislature's prerogative to set these standards pursuant to the Victims' Bill of Rights. The trial court found these changes unconstitutional because the legislature had usurped the Arizona Supreme Court's exclusive authority to establish procedural rulemaking granted by the constitution, that there was no support to the assertion that the changes were made in conjunction with the Victims' Bill of Rights, and even if that were true, the changes did not have any significant impact on victims' rights.

In its ruling the Arizona Supreme Court held ". . . the time limits of A.R.S. §13-4234.D and .F that conflict with Rule 32.4.c violate the separation of powers provision of the Arizona Constitution. We sever the unconstitutional portions of the amendments from the rest of the legislation and thereby leave intact the remaining portions of the statute." Relief was denied.

Prosecutor Misconduct

State v. Hughes, 282 Ariz. Adv. Rep. 31 (1999)

The Arizona Supreme Court reversed the defendant's 13 convictions including first degree murder based upon the prosecutor's cumulative misconduct in his cross-examination, rebuttal, the "fabrication" argument, the "he lies" argument, and his appeal to fear. This was the same prosecutor whose misconduct in *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984) led to a reversal and a determination by the Arizona Supreme Court that retrial was barred.

Death Penalty: Notice

General Principles

Rule 15.1(g)(1), which requires the state to file such notice no later than 30 days after arraignment. The state argued there was no showing of prejudice to the defendant.

ER 3.8. "No prosecutor should ever file a notice of intent to seek the death penalty unless in earnest, after the most careful and deliberative consideration of the evidence and law."

To demonstrate abuse, the defendant had to show some prejudice from surprise or delay. *State v. Lee*

The filing of a notice of intent to seek the death penalty cannot be a fifteen-month afterthought. *Homberg v. DeLeon*

Where the state was three months late in filing the death notice, the court should permit the defendant an evidentiary hearing to determine if the defendant was prejudiced by the delay. *Barrs v. Wilkinson*

Homberg v. DeLeon, 938 P.2d 1110, 243 Ariz. Adv. Rep. 43 (1997) - Notice must be filed within 30 days after arraignment.

The defendant was arraigned on child abuse and first degree murder charges on January 27, 1995. One year and three months later, the state filed its notice to seek the death penalty. The defendant filed a motion to strike the state's notice because it violated Rule 15.1(g)(1), which requires the state to file such notice no later than 30 days after arraignment. The state argued there was no showing of prejudice to the defendant. The defendant argued to the court that his trial preparation would have been entirely different if he had received timely notice of the state's intent to seek the death penalty. The trial court agreed with the state that there had been no prejudice. The defendant filed a special action with the court of appeals, which declined to accept jurisdiction. The supreme court granted review.

In its discussion, the supreme court noted the extraordinary requirements placed upon the county, the defense, the court, and the state when the death penalty is being sought by the state. The county must bear the cost not only of the prosecution, but also the expense of defense fees and expert witness fees. The court must adjust its calendar and marshall law clerks and assistants who might otherwise not be needed. The defendant must have two attorneys who meet specific requirements to represent him or her.

The supreme court held the delay in this matter was "particularly egregious." By the time the notice was filed, both parties had filed their disclosure statement and witness and exhibits lists. This was

not a case where the notice was filed late. It was filed just 18 days before the trial date. Nor was it a case where the state discovered aggravating circumstances during trial preparations. "The filing of a notice of intent to seek the death penalty cannot be a fifteen-month afterthought."

The supreme court went on to reject the state's suggestion that to dismiss the notice would invite prosecutors to routinely file notices of intent to seek the death penalty as part of every first degree murder case. The supreme court did not believe prosecutors would rush to disregard the special provisions of ER 3.8. "No prosecutor should ever file a notice of intent to seek the death penalty unless in earnest, after the most careful and deliberative consideration of the evidence and law."

The matter was remanded to the trial court with instructions to grant the defendant's motion to dismiss the state's notice to seek the death penalty.

State v. Lee, 185 Ariz. 549, 917 P.2d 692 (1996) - Although notice was not filed within 30 days, the defendant had been given oral notice.

The supreme court upheld the trial court's denial of the defendant's motion to preclude the state from seeking the death penalty where the state filed the notice 87 days late. It was undisputed that the defendant had actual oral notice. The court held that to demonstrate abuse, the defendant had to show some prejudice from surprise or delay.

State v. Jackson, 186 Ariz. 20, 918 P.2d 1038 (1996) - Although notice was not filed within 30 days, the defendant had been given oral notice.

The supreme court found no abuse by the trial court in allowing the state to file its notice to seek the death penalty one day late, where the defendant had actual notice of the prosecutor's intent one week before the deadline. The supreme court also rejected the defendant's argument that strict compliance with Rule 15.1(g)(1) was jurisdictional.

Barrs v. Wilkinson, 186 Ariz. 514, 924 P.2d 1033 (1996)

The defendant was arraigned April 3, 1995 on charges of first degree murder, armed robbery, and kidnaping. Pursuant to Rule 15.1(g)(1), the state was required to provide notice of its intent to seek the death penalty within 30 days of arraignment. It did not do so until July 24, 1995, nearly three months late. The trial court, believing the delay to have been inadvertent, denied the defendant's motion to strike. The defendant filed a special action with the supreme court.

The supreme court denied the defendant's motion to strike, reiterating its holding that Rule 15.1(g)(1) does not divest the trial court of jurisdiction to impose a death sentence when the defendant is notified beyond the specified time period. *State v. Jackson*, 918 P.2d 1038 (1996). However, it did hold that the trial court abused its discretion by denying the defendant's request for a hearing. The supreme court noted that this was not a case in which the written notice was filed a few days late or the defendant had actual notice of the state's intent to seek the death penalty. "We think they [the defendant] should have been given an opportunity to investigate that silence and to show what detriment, if any, flowed from it." The matter was remanded for a hearing.

DNA Testing

General Principles

Evidence of a match of two DNA samples was admissible, but Cellmark's method for determining population frequency statistics was rejected. *State v. Bible*

Evidence of a match, even without statistical interpretations of its significance, is admissible, and expert opinion based on personal experience on the likelihood of a random match is admissible. *State v. Boles*

The weight of the evidence does not hinge upon the validity or accuracy of some scientific principle; rather, it hinges on [the expert's] credibility, the accuracy of his past observation . . . the extent of the training . . . and the reliability of his interpretations. *State v. Hummert*

DNA testing can be imposed as a condition of probation for juveniles. It may be imposed retroactively. The results may be used beyond the juveniles 18th birthday. *Maricopa County Juvenile Action Nos. JV-512600 and JV-512797*

Probability Statistics

State v. Garcia, 305 Ariz. Adv. Rep. 7 (1999)

The court of appeals found the state's procedures for determining reliability of DNA matches of mixed samples to conform to the *Frye* Standard.

State v. Marshall, 278 Ariz. Adv. Rep. 23 (1998)

The court of appeals affirmed the use of DNA evidence based upon "probability statistics calculated with the modified ceiling method, essentially a restricted version of the product rule," as upheld in *State v. Johnson*, 186 Ariz. 329, 330, 922 P.2d 924, 925 (1996).

State v. Boles, 238 Ariz. Adv. Rep. 37 (1997)

The defendant appealed his conviction for 18 felony sexual offenses, contending the trial court erred in admitting the expert witness's testimony concerning the DNA's match to the defendant. The court of appeals reversed the defendant's convictions. The state appealed to the Arizona Supreme Court.

The supreme court reviewed its history of decisions regarding DNA testing beginning with

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993). In that case, the supreme court upheld the admission of evidence of a match of two DNA samples, but rejected Cellmark's method for determining population frequency statistics.

In *State v. Johnson*, 186 Ariz. 329, 922 P.2d 292 (1996), the supreme court held that the modified ceiling method of calculating probability of matches, developed by the National Research Council (NRC), was very conservative and protected a defendant's rights. However, in late 1996, the NRC concluded the modified ceiling method was too conservative and modified the random match probability statistics to compensate for subpopulations. As a result, the court of appeals was concerned that without an accepted statistical interpretation of probability of a random match, the evidence was too prejudicial, and thus, inadmissible.

In addressing this question raised by the current appeal, the supreme court turned to the NRC's 1996 revised scientific report. The Report stated:

> Scientifically valid testimony about matching DNA can take many forms. The conceivable alternatives include statements of the posterior probability that the defendant is the source of the evidence DNA, qualitative characterizations of this probability, computations of the likelihood ratio for the hypothesis that the defendant is the source, qualitative statements of this measure of the strength of the evidence, the currently dominant estimates of profile frequencies or random-match probabilities, and unadorned reports of a match. Courts or legislatures must decide which of these alternatives best meet the needs of the criminal justice system.

Restating their position offered in *State v. Hummert*, 238 Ariz. Adv. Rep. 25 (Ariz. Sup. Ct., filed March 11, 1997), the supreme court noted that not only are there various methods to express the significance of DNA matches, but Arizona Rules of Evidence 702 and 703 . . .

> permit opinion evidence by an expert on the rarity of the profiles of two unrelated persons matching when experts testify concerning their own experimentation and observation. This is because the weight of the experts' opinions about their personal experience with random matches did not rely on accuracy of an applied principle of science but on each expert's personal credibility, experience, and interpretations.

The supreme court concluded that ". . . [b]ecause evidence of a match, even without statistical interpretations of its significance, is admissible, and expert opinion based on personal experience on the likelihood of a random match is admissible, the trial judge did not err in allowing the two experts to testify about either the match or their experience with the possibility of a random match. Therefore, we vacate the court of appeals' opinion and affirm the trial judge's ruling and Defendant's convictions."

State v. Hummert, 238 Ariz. Adv. Rep. 25 (1997)

The defendant was charged with and convicted of kidnaping, sexual assault, sexual abuse, and aggravated assault. During the trial, the judge permitted evidence that the defendant's DNA matched that of semen found on the victim's underwear. While disallowing a statistical method of calculating the probability of such a match to the defendant, the trial judge did permit the expert to testify to the

uniqueness of DNA and the expert's personal experience in never finding random matches under the same circumstance. "If a match is random, then the sample could have come from someone other than the person in question."

In his appeal, the defendant claimed the trial judge erred in permitting this evidence of DNA match. Following the holdings in *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), the court of appeals agreed with the defendant and held that experts could only testify a DNA match meant the defendant could not be excluded as the donor of the sample. The court of appeals went on to hold that the experts' testimony about their personal experience of random matches at three loci had the effect of communicating to the jury that the DNA conclusively came from the defendant. The court of appeals held this was prejudicial error and reversed the defendant's convictions. The Arizona Supreme Court granted a review of the case.

The supreme court noted that the court of appeals correctly interpreted *Bible* in that the previously used random match method of calculating frequency of matches was flawed. However, the supreme court went on to note that the court of appeals had erred in concluding that *Bible* absolutely rejects the use of statistics calculating the probability of a random match. Citing the National Research Council's (NRC) latest report, the supreme court went on to explain

> . . . that there is no single or specific scientific method of expressing the significance of a match but, rather, different ways of explaining the significance in a forensic setting . . . From the scientist's standpoint, it is for the courts to decide if the expert may testify on the significance of the match as determined by probability statistics, or draw conclusions, as was done in this case, strictly from personal knowledge and study, if this is the type of information the expert regularly and reasonably relies on.

The supreme court concluded the trial court had acted properly in allowing the expert witnesses' testimony because ". . . the weight of the evidence did not hinge upon the validity or accuracy of some scientific principle; rather, it hinged on [the expert's] credibility, the accuracy of his past observation . . . the extent of the training . . . and the reliability of his interpretations . . ." The court of appeals opinion was vacated and the trial court's rulings affirmed.

State v. Johnson, 221 Ariz. Adv. Rep. 13 (1996)

The defendant was convicted of sexual assault and sentenced to an aggravated term of 14 years. Among other issues, he challenged the trial court's admission of expert testimony about the probability of a random match between the defendant's DNA and DNA extracted from the victim's clothing. Unlike *Bible*, the testimony in this matter relied upon the modified ceiling method recommended by the NRC rather than the Cellmark's method. The court of appeals upheld the conviction. The defendant appealed.

The Arizona Supreme Court granted review in order to address issues left open in *State v. Bible*, 175 Ariz. 549 (1993). First, the Arizona Supreme Court retained *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) as the standard for admitting new scientific evidence rather than *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1992). Secondly, the Arizona Supreme Court confirmed the court of appeals' decision.

> "Based on our review of the NRC (National Research Center) reports, legal commentary, scientific literature, and consideration and acceptance of the modified ceiling method by other jurisdictions, we conclude that the method is generally accepted in the relevant scientific community and that DNA probability calculations computed with that method are admissible under Frye. Our holding extends only to the issue presented in this case--the modified ceiling method. Notwithstanding the 1996 NRC report's conclusions, we do not at this time address the admissibility of probability statistics calculated with the"pure" product rule.

Maricopa County Juvenile Action Nos. JV-512600 and JV-512797, 221 Ariz. Adv. Rep. 38 (1996) - DNA testing outlined in A.R.S. §§ 13-4438 and 31-281 could be imposed retroactively because the statutes were not punitive in nature. The DNA results could be used beyond the juvenile's eighteenth birthday.

In these consolidated matters, both juveniles admitted to counts of child molestation and were ordered to submit to DNA testing as part of their probation conditions. They appealed this condition on a number of issues.

In addressing the first issue, whether A.R.S. §§ 13-4438 and 31-281 could be imposed retroactively pursuant to A.R.S. § 1-244, the court of appeals dismissed the juveniles' argument because they found these statutes not to be punitive in nature and could be imposed retroactively. The court of appeals similarly dismissed the juveniles' second issue, that DNA testing was an unreasonable search and invaded their privacy.

> . . . the expectation of privacy is significantly diminished when one considers that the individual asserting the claim has been adjudicated delinquent for committing a sexual offense. The public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit sex offenses rightfully outweighs the intrusion on the delinquent juvenile's privacy.

The third issue the juveniles raised on appeal involved the use of the DNA results beyond their eighteenth birthday, after the juvenile court lost jurisdiction. The court of appeals held that Arizona's Constitution and the legislature's intent permitted the results to be used after they left the jurisdiction of the juvenile court. Lastly, the court of appeals held that DNA testing did not violate the declared mission of the juvenile court: rehabilitation and treatment.

State v. Johnson, 221 Ariz. Adv. Rep. 13 (1996)

The defendant was convicted of sexual assault and sentenced to an aggravated term of 14 years. Among other issues, he challenged the trial court's admission of expert testimony about the probability of a random match between the defendant's DNA and DNA extracted from the victim's clothing. Unlike *Bible*, the testimony in this matter relied upon the modified ceiling method recommended by the NRC rather than the Cellmark's method. The court of appeals upheld the conviction. The defendant appealed.

The Arizona Supreme Court granted review in order to address issues left open in *State v. Bible*, 175 Ariz. 549 (1993). First, the Arizona Supreme Court retained *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) as the standard for admitting new scientific evidence rather than *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1992). Secondly, the Arizona Supreme Court confirmed the court of appeals' decision.

> "Based on our review of the NRC (National Research Center) reports, legal commentary, scientific literature, and consideration and acceptance of the modified ceiling method by other jurisdictions, we conclude that the method is generally accepted in the relevant scientific community and that DNA probability calculations computed with that method are admissible under Frye. Our holding extends only to the issue presented in this case--the modified ceiling method. Notwithstanding the 1996 NRC report's conclusions, we do not at this time address the admissibility of probability statistics calculated with the"pure" product rule.

Maricopa County Juvenile Action No. JV-508801, 187 Ariz. Adv. Rep. 26 (1995)

In response to three cases that involved juveniles having to submit blood samples to the Arizona DNA Identification System as a condition of probation, the court of appeals consolidated these matters into one decision. In each of these cases, the juvenile was adjudicated delinquent based upon allegations that he had molested another child. In none of the cases was the victim exposed to the juvenile's blood or bodily fluids. In each instance, the state had requested and the juvenile court ordered the juvenile to submit a blood sample for DNA registration as a condition of probation. In one instance, the court had noted the DNA prints would be destroyed or sealed upon the juvenile's 18th birthday.

The court of appeals, in a split decision, ruled the juvenile courts could not order DNA testing for juveniles. The court noted that the Arizona DNA Identification System was enacted through A.R.S. § 41-2418(A) and the offenders required to submit to DNA testing were outlined in A.R.S. § 13-4438. This latter statute identifies offenders convicted of sexual offenses as those who must be DNA tested. Since A.R.S. § 8-207(A) specifies that juveniles delinquents are not convicted of offenses, the court of appeals reasoned they could not be required to complete DNA testing. The court was careful to note that the juvenile courts have wide discretion in imposing conditions of probation, but in this case, the addition of DNA testing was an expansion of the criminal code. "Defining crimes and fixing penalties are legislative, not judicial functions." *State v. Wagstaff*, 164 Ariz. 485 (1990).

Judge Lankford dissented. He felt the outlined statutes did not preclude the juvenile court from requiring DNA testing as a condition of probation. "The fact that the legislature has not required testing does not mean that testing is prohibited. It is one thing to require a test; it is another to forbid the test. The legislature has not forbidden DNA testing of juveniles. On the contrary, the legislature has accorded the superior court broad powers regarding the disposition and treatment of juveniles." Citing A.R.S. § 8-241(A)(2)(b) in which the juvenile court may award a delinquent child " . . . to a probation department, subject to such conditions as the court may impose," Judge Lankford reasoned the court may impose appropriate conditions without expanding the criminal code. Emphasizing the court's broad discretion, Judge Lankford cited *Maricopa County Juvenile Action No. JV-128676*, 177 Ariz. 352 (1994) in which the court of appeals held " . . . [a] condition of probation which does not violate basic fundamental rights and bears a relationship to the purpose of probation will not be disturbed on appeal."

State v. Clark, 164 Ariz. Adv. Rep. 68 (1994)

After the defendant was convicted of a number of kidnaping and sexual assault charges, he appealed arguing that the trial court should not have admitted DNA testing results.

In a 2-1 decision, the court of appeals ruled that the admission of DNA testing in this case was reversible error and remanded the cases for a new trial. The majority distinguished this case from *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), by the facts that 1) the jury in the present matter did not hear defense witnesses dispute the reliability of DNA testing as occurred in *Bible* and 2) the other substantiating evidence in this trial was "far from overwhelming" as it had been in *Bible*. Consequently the majority felt the introduction of the DNA testing could have created unfair prejudice and could have created reversible error.

In dissent, Judge Gerber felt the majority was creating a new standard of evidentiary error and was misinterpreting *Bible*. He contended there was nothing in *Bible* that superseded the traditional test for harmless error. He felt there was sufficient evidence other than DNA testing to establish the defendant's guilt and the introduction of the undisputed DNA testing was harmless error.

Domestic Violence

General Principles

A.R.S. § 13-3601(H) permits the defendant to be placed on probation without a judgment of guilt. If probation is successfully completed, the charges against the defendant will be dismissed.

Although a conviction under A.R.S. § 13-3601(H) and placement on probation precludes a judgment of guilt, the sentencing enhancements of A.R.S. § 13-604.02, committing a new felony while on probation, may be alleged. *State v. Green.*

The court may not impose the $100 felony assessment on those placed on probation under A.R.S. § 13-3601(H) since there is no conviction. *State v. Perez*.

State v. Green, 136 Ariz. Adv. Rep. 3 (1993) - Those placed on probation under the domestic violence statute are considered on probation and the sentence for a subsequent offense can be enhanced.

The defendant was placed on probation under A.R.S. § 13-3601(H) after beating up his wife and breaking her jaw. Two months later, the defendant tried to kill her and her boyfriend. The trial court enhanced the defendant's sentence on this new charge noting he was on probation at the time. The defendant appealed contending A.R.S. § 13-3601 precluded any previous judgment of guilt. The court of appeals held that A.R.S. § 13-3601(H) precluded enhanced sentencing since there was no conviction.

On subsequent appeal by the state, the Arizona Supreme Court reversed the court of appeal's ruling and held that the defendant was on probation at the time of the subsequent offense and the new sentence could be enhanced.

State v. Perez, 107 Ariz. Adv. Rep. 20 (1992) - No felony assessment can be levied to those on probation under A.R.S. § 13-3601.

The court imposed a $100 felony assessment following the defendant's conviction of attempted kidnaping, a class 3 felony and placed the defendant on probation under A.R.S. § 13-3601 (domestic violence) in which the court does not enter a judgment of guilt. The court of appeals ruled the sentencing court did not have jurisdiction to impose the felony assessment since there was no conviction.

State v. Sirny, 772 P.2d 1145 (1989)

Jail as a condition of probation is not authorized in the deferred prosecution cases of domestic violence [A.R.S. § 13-3601(D)].[2]

[2]Changes in A.R.S. § 13-3601 beginning in August, 1989, permitted incarcerati

Driving Under the Influence (DUI)

In regards to Victims' Rights, DUI is not a victimless crime. *State v. Superior Court in Maricopa County, Judge Bolton*

The four months imprisonment for aggravated DUI may not be delayed. It must begin at the time of sentencing. *State v. Arzola*.

Defendants are entitled to a jury trial in DUI charges. *Rothweiler v. Superior Court of Pima County*, 100 Ariz. 37

State v. Panveno, 296 Ariz. Adv. Rep. 25 (1999)

The defendant appealed his conviction of driving on a suspended license and aggravated driving with a blood alcohol concentration (BAC) of 0.10 or more within two hours of driving. During his jury trial, the defendant presented an expert who testified that the defendant's BAC could have ranged from 0.026 to 0.185 at the time of his arrest. The jury found the defendant guilty. The court of appeals upheld the convictions. In its holding, the court first held in accordance with *State v. Arredondo*, 155 Ariz. 314, 746 P.2d 484 (1987), that in considering insufficient evidence issues, the court must consider the evidence most favorable to sustaining the jury's verdict. While the defendant presented credible evidence, the jury also hear evidence from the state and concluded the defendant was guilty. Unlike *State v. Cannon*, 192 Ariz. 236, 963, P.2d 315 (App. 1998), in which the affirmative defense was upheld, the state's witnesses in this matter also provided credible evidence and the jury was free to draw its own conclusions.

State v. Sanders, 283 Ariz. Adv. Rep. 10 (1998)

The defendant was arrested for DUI and took her to the police station. When asked to submit to a breathalyzer test, she refused and asked to call her attorney. The attorney's answering service asked for a "call back" number so the attorney could call her right back. Since there was no number on the phone, the defendant asked the officers. They refused to give her the number explaining that no one could call back. The defendant refused to take the test and was convicted of DUI. She appealed, arguing that she had been denied her right to counsel. The court of appeals concurred. The deputies should have given her a number so she could have spoken to her attorney. The conviction and sentence were vacated with directions to dismiss.

State of Arizona v. Superior Court (Wing), 254 Ariz. Adv. Rep. 14 (1997) - A defendant can plead to attempted DUI.

Judge Wing in Navajo County refused to accept the plea agreement defendants Bryant and Sanchez entered with the Navajo County Attorney's office in which they pleaded guilty to amended charges of attempted aggravated DUI, a class 5 felony. The court rejected the plea agreement finding there was no such offense recognized under Arizona law, and the state is prohibited from dismissing a DUI charge in return for a plea of guilty to any other offense. The defendants and the state filed a special action.

The court of appeals held that a conviction for attempted aggravated DUI could result if the court found the defendant (1) under the influence of intoxicating liquor or drugs (2) while his license was suspended or revoked (3) had taken a step beyond mere preparation and toward actual physical control of a vehicle without actually taking actual physical control of the vehicle. The court of appeals went on to hold that the prohibition limiting a plea to DUI was limited to A.R.S. § 28-692 and not A.R.S. § 28-297.

It concluded the trial court erred in not accepting the plea. There is a recognized crime attempted aggravated DUI and the state can offer a plea to such.

State of Arizona v. Superior Court (Seidel), 255 Ariz. Adv. Rep. 27 (1997)

A private citizen noticed Seidel driving erratically. At a stoplight, the citizen convinced the defendant to allow her to drive his vehicle. She drove him to the police department and advised two officers that she had observed him driving while intoxicated. The officers arrested him.

The trial court dismissed the charges indicating the officers did not have probable cause to arrest the defendant. The state appealed to the superior court. The superior court, without conducting a *de novo* review, also determined the officers did not have probable cause and dismissed the matter. The state appealed.

The court of appeals held the superior court should have conducted a *de novo* review. If it had done so, it would have found there was reasonable cause for the officers to arrest the defendant. The matter was remanded to the trial court.

Myers v. Reeb, 253 Ariz. Adv. Rep. 32 (1997) - a person charged with DUI had the right to a jury trial

Myers requested a jury trial for the charge of Driving Under the Influence. Judge Reeb of the Mesa City Court refused the defendant's request. The defendant appealed to the superior court, which reversed the magistrate's order. The state appealed.

The court of appeals held that the judge's failure to follow the Arizona Supreme Court's ruling in *Rothweiler v. Superior Court of Pima County*, 100 Ariz. 37, 410 P.2d 479 (1966) in which it held that a person charged with DUI had the right to a jury trial was a malfeasance. The superior court judgment was affirmed.

State v. Chavez, 253 Ariz. Adv. Rep. 38 (1997) - Prison time as a condition of probation must be included in total amount of jail time.

Following the defendant's conviction for Driving Under the Influence, the court placed him on probation and ordered him to serve four months in prison and one year in jail. The defendant appealed. The court of appeals noted A.R.S. § 13-901(F) permits a person placed on probation to serve no more than a year as a condition of probation. In this matter, the defendant could serve no more than eight months in jail.

State v. Superior Court in Maricopa County, Judge Bolton, 200 Ariz. Adv. Rep. 31 (1995) - Victim of DUI accident can invoke victims' rights.

Patrick Cunningham struck a vehicle driven by Peter Munjas. Cunningham was charged with aggravated driving while under the influence of intoxicating liquor, a class 4 felony. During discovery, Cunningham's counsel requested that he interview Munjas. Munjas refused pursuant to victims' rights contained in A.R.S. § 13-4433. The trial judge granted Cunningham's motion to depose Munjas, finding that because he was not a crime victim he could not refuse a defense interview. The state filed a special action to determine if the trial judge erred in ruling that a person suffering property damage in a DUI collision is not a "victim" as defined by A.R.S. § 13-4401 through -4437.

The court of appeals noted Cunningham asserted that Munjas was not a victim because DUI is a "victimless" crime, Cunningham did not intend to harm Munjas, and Munjas was not personally "harmed" by the collision. Relying upon the plain language of the Victims' Bill of rights, the court of appeals held Munjas fell within the definition of "victim" as "a person against whom the criminal offense was committed."

"Although Cunningham only damaged Munjas' car rather than Munjas personally, the crime of DUI was nonetheless committed against him. Similarly, the definition of criminal offense . . . requires us to conclude that Cunningham's actions constituted a criminal offense threatening Munjas with physical injury. Common sense demands the same conclusion . . . Cunningham did not need a specific intent to harm Munjas . . . (and) he was the victim of property damage because his car was damaged. The statutory and constitutional provisions of the Victims' Bill of Rights do not require that a victim suffer personal injury to fall within the definition of a crime victim." The court of appeals held Munjas could refuse a pre-trial defense interview. The trial court's order was reversed.

State v. Arzola, 196 Ariz. Adv. Rep. 24 (1995) - Prison as a condition of prison for DUI conviction must begin at time of sentencing. It cannot be delayed.

The defendant pled guilty to aggravated driving under the influence of alcohol with a blood alcohol content of .10 percent or more, a class four felony. The court placed the defendant on probation and ordered him to serve four months in the Department of Corrections to begin two months later. The state appealed arguing that A.R.S. § 28-697 (E) requires a defendant to begin the period of incarceration at the time of sentencing.

The court of appeals concurred with the state. "Section 28-697(E) makes it clear . . . that a

defendant convicted of aggravated DUI is not eligible for any sort of release until he has served at least four months in prison. Thus, the statute requires the four-month imprisonment to be served immediately after sentencing, and the trial judge should not have delayed it in this case."

State v. Stevens, 173 Ariz. Adv. Rep. 74 (1994)

The defendant was convicted of DUI following the application of the horizontal gaze nystagmus (HGN) test and intoxilyzer tests. The defendant appealed the conviction, arguing the HGN test should not have been admitted because his expert witness convincingly argued that the HGN test was flawed in instances where the suspect wore hard contact lenses. The witness testified that these lenses call into question two of the six cues used in the HGN test.

In its ruling, the court of appeals noted that substantial evidence had been offered that even with four of the cues, there was reliable foundation to use the test. Moreover, the court of appeals noted that the defendant's expert witness did not testify that the two questioned cues were inaccurate, simply that there were no studies providing definitive answers if hard contact lenses impacted the results. The conviction was affirmed.

State v. Ekmanis, 166 Ariz. Adv. Rep. 28 (1994)

The defendant was arrested in March, 1990 for DUI. At that time, he surrendered his chauffeur's license to the arresting officer and retained his general operator's license. A year later, the defendant was arrested for DUI. At his subsequent conviction for Aggravated DUI, the defendant maintained that his license was never revoked. The defendant appealed that conviction. The court of appeals concluded from the record that there was substantial evidence to show the defendant knew or should have known his license had been revoked. The conviction and sentence were upheld.

Gibbons v. Superior Court of Arizona in La Paz County, 163 Ariz. Adv. Rep. 18 (1994)

Gibbons was charged with aggravated DUI, a class 4 felony under A.R.S. § 28-697(A)(1). He pled to DUI while on a suspended license. Prior to sentencing, Judge Irwin ruled that the defendant would be subject to a mandatory four-month sentence proscribed by A.R.S. § 28-697(E) and allowed the defendant to withdraw from his plea. The defendant did not withdraw and was sentenced to the mandatory incarceration. He filed a special action with the court of appeals arguing that the mandatory sentence applied only to those convicted of aggravated DUI with two or more prior DUI's within the past 60 months. Since Gibbons did not have two previous DUI's, he argued that the mandatory sentence did not apply.

The court of appeals agreed that the construction of A. R. S. § 28-697 was confusing and open to interpretation. In its ruling it held that the phrase " . . . who within the past sixty months has been convicted of two prior DUI violations " was intended to refer to only those defendants convicted of aggravated DUI under A.R.S. § 28-697(A)(2). This qualifying phrase did not apply to those, who like the defendant, were convicted of Aggravated DUI under A. R .S. § 28-697(A)(1). Accordingly, the court of appeals concurred that the mandatory four-month sentence was appropriately applied by the trial court.

Relief was denied.

Ineffective Assistance of Counsel

Maricopa County Juvenile Action No. JV-511576, 219 Ariz. Adv. Rep. 6 (1996)

The juvenile appealed his transfer hearing to adult court, arguing that he had received ineffective assistance of counsel. The court of appeals noted that although *Pima County Juvenile Action No. J-47735-I*, 26 Ariz. App. 46 (1976) indicated that the right to counsel may not apply in juvenile proceedings, the United States Supreme Court held otherwise in *Kent v. United States*, 383 U.S. 541 (1966), noting ". . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, *without effective assistance of counsel.*" In this matter, the defense counsel did not present a second, more favorable psychological evaluation that had obtained at the juvenile's expense, did not call the psychologists at the transfer hearing, did not seek a continuance to interview witnesses, and did not return the parents' telephone calls. At the transfer hearing, the defense counsel relied solely upon the court-appointed psychologist and probation officer, and did not cross-examine them. The court of appeals held it was "compelled to agree with the juvenile that, on the facts present here, the attorney's performance was deficient as measured by reasonable professional standards . . . We therefore hold that the juvenile did not receive constitutionally effective assistance of counsel in the transfer hearing, and we reverse and remand for proceedings consistent with this opinion."

State v. Rosas, 186 Ariz. Adv. Rep. 22 (1995) - Defense counsel is not required to advise non-citizen defendant about possible collateral deportation.

Following the defendant's plea and sentence to prison, he filed a petition for post-conviction relief alleging he would not have pled guilty if he had known he would be deported. The trial court rejected the petition of ineffective assistance of counsel. The court of appeals accepted review but denied relief. "We . . . decline to impose upon defense counsel a duty to inform non-citizen defendants about potential collateral deportation proceedings that may result from entering a guilty plea. Accordingly, we hold that failure of counsel to provide such information to defendant does not constitute ineffective assistance of counsel."

State v. Vickers, 179 Ariz. Adv. Rep. 3 (1994)

The defendant was convicted of first degree murder of his cellmate. On an automatic appeal to the Arizona Supreme Court, the court addressed the issues of effective assistance of counsel and destruction of all physical evidence. Relying heavily upon the state's pre-trial motion to determine effective counsel, the court concluded that the defense attorney's " . . . performance fell outside the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668. The court found that " . . . there is more than a mere possibility that the outcome of the defendant's trial would have been different but for (the counsel's) errors." The court went on to conclude the destruction of the physical evidence was not the result of bad faith conduct and no basis for appeal. However, because the court found the defendant was denied effective assistance of counsel, the conviction and sentence were

reversed.

In a strongly worded dissent, Justice Martone provided remarks " . . . so that mistakes will not be repeated on retrial and so that trial judges in other cases will have some guidance on what to do when confronted by a plainly ineffective lawyer." In his opinion, when presented with undisputed evidence of ineffective assistance, a trial judge must remove counsel and substitute adequate counsel. The judge should make the appropriate record to protect against claims that he or she interfered with the defendant's choice of counsel.

Intensive Probation Supervision (IPS)

General Principles

If the defendant is found to have committed a new felony, the court must revoke IPS and sentence the defendant to prison. *State v. Taylor*

If, after Shock Probation is imposed, the defendant is found to be ineligible, the court may sentence the defendant to prison. *State v. Bradley*

State v. Taylor, 214 Ariz. Adv. Rep. 15 (1996) - If the trial court finds the defendant in violation as a result of behavior that constituted another felony, it must revoke IPS and sentence the defendant to prison. The matter does not have to be alleged as a new crime.

The defendant was found to have violated the conditions of his standard and IPS probations by admitting to use of drugs. Following these admissions, the trial court imposed prison noting, "the sentence might well be different" if the court did not feel constrained by A.R.S. § 13-917(B). The court felt that this statute required revocation because the defendant had been found to have committed an additional felony offense. The defendant appealed, arguing that only when a condition 1 allegation is proven must the court revoke IPS.

The court of appeals did not accept this argument. It indicated the statute was quite clear. If the trial court found the defendant in violation as a result of behavior that constituted another felony, it must revoke IPS and sentence the defendant to prison. As another example, the court of appeals indicated that if the defendant was found to have violated IPS by possessing a weapon, this also would constitute a new felony and revocation would be required.

In its closing statements, the court of appeals noted that this interpretation did not relieve the probation officer of any discretion. They indicated the officer has discretion whether or not to file for a violation and has discretion as to the factual basis of any alleged violations.

State v. Bradley, 147 Ariz. Adv. Rep. 31 (1993) - If defendant sentenced to Shock Program does not qualify, the court may not resentence the defendant to prison, absent a finding that the defendant had violated the conditions of probation.

The defendant was placed on IPS and ordered to complete the Shock Program. During the eligibility screening at the Department of Corrections (DOC), the defendant was found to have had a previous prison sentence, and thus was ineligible for Shock. He was returned to the trial court. The court vacated its previous order and, because shock was not available, sentenced the defendant to prison. The court of appeals vacated this sentence holding that the trial court could not resentence the defendant

absent a finding that he violated the conditions of his probation. Instead, it held the trial court could only modify the conditions of probation. It reasoned that a finding of ineligibility was not a violation of a condition of probation.

The state appealed to the Arizona Supreme Court, which vacated the court of appeal's's decision. The Arizona Supreme Court held that the statute permitted the trial court to return to "square one" in sentencing the defendant if he were found ineligible for the shock program. It upheld the trial court's action to sentence the defendant to prison once the shock program was not an option.

State v. Galven-Cardenas, 799 P.2d 19 (1990)

Intensive Probation Supervision may be denied if there is no team in the defendant's home area or if there are no mitigating factors to warrant probation at all.

State v. Perkins, 767 P.2d 729 (1988)

Defendants do not need to be advised at change of plea of possibility of Intensive Probation Supervision (IPS). IPS is considered within the confines of probation when a plea is entered.

Judicial Issues

General Principles

A sentence of six months in jail and a $2,500 fine is not a "severe penalty" that requires a jury trial. *State v. The Superior Court in Maricopa County (Tibshraney)*

The offense of leaving the scene of an accident warrants a jury trial if requested because it involves "moral turpitude."

Justices of the peace do not have to be attorneys. *Massey v. Bayless*

Removing a monitoring device constitutes the crime of escape. *State v. Williams*
The Arizona Supreme Court determined that A.R.S. § 13-4037(B) allows it to reduce sentences. *State v. DePiano*

Justices

The Office of the Public Defender cannot be appointed to represent indigent defendants in psychiatric security hearings. *Coconino County Public Defender v. The Honorable Charles Adams*.

Ordering the allocation of sufficient funding for the court from the board of supervisors should be employed only under extraordinary circumstances and as a last resort after reasonable avenues of cooperation and compromise have been exhausted. *Maricopa County v. Tinney, Rose, and Barker*.

Double Jeopardy

State v. Ryan, 296 Ariz. Adv. Rep. 43 (1999) - When a defendant is convicted on a lesser-included offense, the conviction operates as an acquittal of the greater charge

The defendant was tried for aggravated assault, kidnapping, and felony murder predicated on kidnapping. The jury found the defendant guilty of aggravated assault and unlawful imprisonment (a lesser-included offense of kidnapping). After the court ruled that the state could retry the defendant for felony murder predicated on the kidnapping, the defendant filed a special action on double jeopardy grounds. The court of appeals accepted jurisdiction and granted relief.

When a defendant is convicted on a lesser-included offense, the conviction operates as an acquittal of the greater charge. In this instance, the defendant could not be retried for felony murder predicated upon the kidnapping charge, although he could be tried on felony murder based upon predicates other than kidnapping.

Jury Issues

State v. Smith, 305 Ariz. Adv. Rep. 3 (1999) - Defense counsel cannot waive a twelve-man jury for the defendant.

The court of appeals held that the right to a twelve-man jury is "so inherently personal that it cannot be waived by defense counsel; only the defendant can waive it." And since the trial court in this matter did not personally address Smith and tell him that he had a right to a twelve-man jury, it did not ascertain if the waiver was made intelligently and voluntarily. The conviction was reversed and the matter remanded for a new trial.

State v. Quintana, 303 Ariz. Adv. Rep. 5 (1999) - If the charge is amended by the state to a misdemeanor, the defendant is not entitled to a twelve-man jury. Once a defendant is found to have violated the conditions of probation, the trial court can increase the probation period up to the statutory maximum.

After a jury deadlocked on the defendant's charge of trespass, a felony, the state amended the charge to a misdemeanor. At a subsequent bench trial, the defendant was found guilty of this charge and placed on probation for six months. Later, he was found in violation of that probation. The court increased the term of probation to two years. The defendant appealed arguing he had been denied a right to a jury trial and that the court erred by increasing the length of his probation.

The court of appeals held that since the state amended the charge to a misdemeanor, the defendant was not eligible for a jury trial. These facts are distinguishable from *State v. Frey*, 141 Ariz. 321, 686 P.2d 1291 (App. 1984), where the trial judge unilaterally reduced the charge from a felony to a misdemeanor.

Citing *State v. Blackman*, 114 Ariz. 517, 518, 562 P.2d 397, 398 (App. 1977) and *State v. Findler*, 152 Ariz. 385, 386, 732 P.2d 1123, 1124 (App. 1987), the court of appeals noted that once a defendant is found to have violated the conditions of probation, the trial court can increase the probation period up to the statutory maximum. The trial court's rulings were affirmed.

Amancio v. Forster, 292 Ariz. Adv. Rep. 28 (1999)

The defendant was arrested for unlawful imprisonment, a class 6 felony, but the prosecutor designated the offense a class 1 misdemeanor, which would not entitle him to a jury trial. The defendant filed a special action in superior court arguing he was entitled to a jury trial since this crime is classified as a felony by A.R.S. §13-1303(A)(1989). The superior court upheld the city court's denial of a jury trial. The defendant appealed.

The court of appeals reviewed the various cases that have determined when a matter is jury eligible.

> (See *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966) DUI is eligible because of the penalties; *State ex rel. Baumert v. Superior Court*, 127 Ariz. 152, 618 P.2d 1078 (1980) disorderly conduct regardless of the penalty is not jury-eligible; *Spitz v. Superior Court*, 127 Ariz. 405, 621 P.2d 911 (1980) sale of liquor to a minor is not jury-eligible; *Mungarro v. Riley*, 170 Ariz. 589, 826 P.2d 1215 (App. 1991) false reporting to a law

enforcement officer is jury-eligible because the crime reflects on the defendant's moral character; *Frederickson v. Superior Court*, 187 Ariz. 273, 928 P.2d 697 (App. 1996) leaving the scene of an accident was jury-eligible because the crime reflects on the defendant's character; *Campbell v. Superior Court*, 186 Ariz. 526, 924 P.2d 1045 (App. 1996) a charge of cruelty to animals does not involve moral turpitude and it does not reflect on the character of the defendant, it is not jury-eligible; *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989) a possession of marijuana charged designated by the prosecutor as a class 1 misdemeanor warranted a jury trial because of the grave consequences of decreased job opportunities and foreclosure of some licenses; *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 945 P.2d 1251 (1997) although a charge of domestic violence would prohibit the defendant from owning a gun, he was not eligible for a jury trial because it lacked moral turpitude and a conviction would not greatly impact his employment opportunities; *State v. Frey*, 141 Ariz. 321, 686 P.2d 1291 (App. 1984) the possible maximum penalty authorized . . . for the crime charged by the prosecutor, . . . triggers the right to a jury trial.

Relying on *Frey*, the court of appeals determined that there was no implication of moral turpitude and no entitlement to a jury under common law and therefore the defendant was not entitled to a jury trial.

State v. Garcia-Contreras, 262 Ariz. Adv. Rep. 13

On the opening day of the defendant's trial, the court was advised that the defendant's civilian clothing had not arrived. The defense requested a delay in selecting the jury until the afternoon. The court denied this request, indicating the defendant could appear in his custody clothes or waive his presence for jury selection. Based upon his attorney's advice, the defendant waived his appearance during the jury selection. He was subsequently found guilty and sentenced to prison. He appealed, arguing he had been improperly denied his right to be present for jury selection. The court of appeals reviewed the matter and concluded the defendant's absence was involuntary, but the error was harmless. The defendant petitioned the Arizona Supreme Court for review.

The Arizona Supreme Court held that while it is the defendant's responsibility to ensure the availability of civilian clothing at trial, it agreed with the court of appeals that in this matter the defendant did not voluntarily waive his right to be present during the jury selection. The supreme court went on to hold that the error was not harmless. ". . . by denying the short continuance that defendant requested, the trial court effectively deprived him of his constitutional right to be present for jury selection." The convictions were reversed and the matter remanded for a new trial.

State v. Pope, 262 Ariz. Adv. Rep. 17 (1998)

The defendant appealed his conviction claiming he was entitled to a 12-person jury rather than an 8-person panel. Although the defendant's charges exposed him to a possible sentence of 81 years, the state initially offered to stipulate that his possible sentence would not exceed 30 years. The defendant argued that the state should dismiss some of the charges so the sentence could not exceed 30 years. The state declined. The court then entered a finding that the jury would consist of 8 people and the defendant would not be sentenced to more that 30 years.

The court of appeals held the court could not issue such an order. Unlike *State v. Thorne*, 258 Ariz. Adv. Rep. 20 (1997), where the state's stipulation was an acknowledgment of the possible range of sentences, the court in this matter was limiting the sentence that was authorized. The conviction was vacated and remanded.

State v. Thorne, 258 Ariz. Adv. Rep. 20 (1997)

The defendant was originally charged with attempted first degree murder, and two counts of aggravated assault. As a result of pre-trial stipulations and a recognition that the two offenses originated from a single act, thus precluding consecutive sentences, the maximum sentence the court could impose was 29.75 years. Accordingly, the trial was held before an eight person jury in accordance with A.R.S. § 21-102(B). Following his conviction, the defendant appealed arguing he deserved a 12-person jury since the original charges carried a maximum of more than 30 years.

The court of appeals dismissed the defendant's argument, holding that " . . . the determination of the maximum potential sentence may be made at any time prior to the submission to the jury . . . Until a case is submitted to the jury, the state may amend the charges in a manner that could reduce the defendant's possible sentence." The defendant's conviction was affirmed.

State v. Greer, 257 Ariz. Adv. Rep. 3 (1997)

Following the defendant's conviction, he filed an appeal arguing that the 1995 amendment to Rule 18.6 (e) which allows jurors to submit to the court written questions directed to witnesses or the court violated his right to an impartial jury. He argued that with this procedure, the jury became advocates rather than remaining impartial. The court of appeals dismissed the defendant's argument. His conviction was affirmed.

State v. Virgo, 255 Ariz. Adv. Rep. 30 (1997)

The defendant was arrested for possession of marijuana for sale and transportation of marijuana. The defense and the state entered into a stipulation that was presented to the jury that the defendant possessed 35 pounds of marijuana in both matters. The jury found the defendant guilty of two lesser-included offenses, possession of marijuana. The court, relying upon the stipulation, sentenced the defendant as if the offenses were class 4 felonies rather than class 6 felonies. The defendant appealed, claiming the court improperly relied upon the stipulation to determine the class of the felony.

The court of appeals held that the amount of marijuana is an essential element of a possession offense. In this matter, the jury did not accept or reject the stipulation. Accordingly, the court could not use that as an element in sentencing. The matter was remanded to the trial court to sentence the defendant in accordance with a class 6 felony.

State v. The Superior Court in Maricopa County (Tibshraney), 248 Ariz. Adv. Rep. 31 (1997)

The defendant was charged in city court with contracting without a license, which carries a maximum sentence of six months' imprisonment and a $2,500 fine. His request for a jury trial was denied by the municipal court judge. He was found guilty. He appealed to the superior court where he again requested a jury trial. The superior court judge granted this request, ruling the fine was sufficiently severe to warrant a jury trial. The state appealed.

The court of appeals held that the fine was not sufficient to warrant a jury trial. Citing *Frederickson v. Superior Court*, 187 Ariz. 273, 928 P.2d 697 (App. 1996), *State v. Harrison*, 164 Ariz. 316, 792 P.2d 779 (App. 1990), and *Mungarro. v. Riley*, 170 Ariz. 589, 826 P.2d 1215 (App. 1991), the court continued to hold that six months' incarceration and a $2,500 fine did not expose the defendant to a "severe penalty" requiring a jury trial.

State v. Frederickson, 219 Ariz. Adv. Rep. 33 (1996) - Leaving the scene of an accident involves "moral turpitude" and entitles the defendant to a jury trial.

The court of appeals concurred with the defendant that he was entitled to a jury trial in city court for the offense of leaving the scene of an accident because it involved "moral turpitude." Under Arizona law a crime is a jury-eligible offense if (1) the defendant is exposed to sever penalty; (2) the act involves moral turpitude; (3) the crime has traditionally merited a jury trial. *State v. Harrison*, 164 Ariz. 316 (App. 1990).

State v. LeBlanc, 224 Ariz. Adv. Rep. 47 (1996) - Jury instructions

The defendant was convicted of driving under the influence of intoxicants on a suspended license. The trial court gave the jury instructions outlined in *State v. Wussler*, 139 Ariz. 428 (1984). The court of appeals confirmed the conviction in a memorandum decision. In his request for review, the defendant challenged *Wussler* and argued that the instructions denied him full benefit of the reasonable doubt standard, thereby denying him due process rights.

The Arizona Supreme Court agreed with the defendant. It held that requiring the jury to acquit the defendant on the charged offense before considering the lesser-included offenses provided too little flexibility in reaching a just result.

> It now appears that requiring a jury to do no more than use reasonable efforts to reach a verdict on the charged offense is the better practice and more fully serves the interests of justice and the parties. Under this method, jurors may render a verdict on a lesser-included offense if, after full and careful considerations of the evidence, they are unable to reach agreement with respect to the charged crime. Thus, the jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge.

Miscellaneous Judicial Issues

State v. Zaman, 307 Ariz. Adv. Rep. 12 (1999) - A county sheriff can serve process on a non-Indian residing on an Indian reservation in Arizona.

The Arizona Supreme Court reversed the court of appeals holding in *State v. Zaman*, 261 Ariz. Adv. Rep. 28 (App. Jan. 27, 1998) which precluded a sheriff from serving process on a non-Indian on an Arizona Indian reservation. The majority based it decision on *Langford v. Monteith*, 102 U.S. 145, 147, 26 L. Ed. 53, 54 (1880) in which the U.S. Supreme Court held that when a state has civil jurisdiction over a non-Indian, it has jurisdiction to serve process on that non-Indian on a reservation. The dissent argued that while the state may have such jurisdiction, it should refrain from doing so. Instead, service should be made in accordance with Arizona law and Navajo law, "thus showing respect for tribal sovereignty." The court of appeals opinion was vacated.

State v. Zaman, 261 Ariz. Adv. Rep. 28 (1998) - See ***State v. Zaman***, 307 Ariz. Adv. Rep. 12 (1999) which supercedes this case.

The court of appeals held that the court had no jurisdiction over the defendant because he was served on the reservation by a process server not authorized by the tribe.

State v. Geotis, 231 Ariz. Adv. Rep. 35 (1996)

Supported by *United States v. Ursery*, 116 S. Ct. 2135 (1996), the court of appeals confirmed " . . . that civil forfeiture under federal statutes does not constitute 'punishment' for purposes of the Fifth Amendment's double jeopardy clause.'"

Massey v. Bayless, 230 Ariz. Adv. Rep. 22 (1996)

The court of appeals held that justices of the peace do not have to be attorneys.

State v. Williams, 227 Ariz. Adv. Rep. 18 (1996) - Removal of an electronic device and unauthorized departure from home detention constitutes escape as defined by statute.

The defendant was released to the Yuma County Pretrial Services pending trial. He was ordered to wear an electronic monitoring device and to remain in his home as a condition of his pretrial release. Within two weeks, he removed the monitoring device and left his home. Two days later, he was arrested in California. He was indicted for escape pursuant to A.R.S. § 13-2503(A)(2) escaping from custody as a result of having been arrested for a felony. The defendant was convicted and sentenced to prison. He appealed arguing that removal of an electronic device and unauthorized departure from home detention did not constitute escape as defined by the cited statute.

The court of appeals held that "custody begins when an arrest is made and continues until the

defendant is lawfully discharged. *State v. Sanchez*, 145 Ariz. 313, (1985). An escape occurs when there is a 'departure from custody . . . with knowledge that such departure is unpermitted.'" In this matter, the defendant had a clear understanding that he was not to remove the monitoring device or leave his home. The conviction and sentence were affirmed.

State v. DePiano, 224 Ariz. Adv. Rep. 34 (1996)- Excessive sentence

DePiano, deserted by her husband and despondent from a broken relationship with her boyfriend, attempted to commit suicide and infanticide of her two children by running a car in the closed garage. An alert neighbor summoned the police, who intervened before anyone was injured. DePiano was convicted of two counts of child abuse under A.R.S. § 13-3623(B)(1). Prior to the jury's verdict, she absconded. She was apprehended several months later and sentenced to the presumptive term of 17 years on each count to be served consecutively and without release as required by the statutes. The court of appeals confirmed the conviction and the sentence. The Arizona Supreme Court granted review.

With considerable dissension, the majority held that the defendant's sentence was excessive and reduced each sentence to 12 years, to be served without release and consecutively. Writing for the majority to reduce the sentence, Justice Martone first found the defendant's sentence to be constitutional and did not constitute cruel and unusual punishment. In doing so, he disavowed the tenets of *State v. Bartlett*, 171 Ariz. 302 (1992), which would require the court to examine the specifics of the defendant's crime. Instead, he viewed the crime and punishment in general terms and reasoned the sentence was constitutional. However, he concurred with Justices Zlaket and Feldman that A.R.S. § 13-4037(B) gave the court statutory authority to reduce the defendant's sentence, which he felt was appropriate in this matter.

Justices Moeller and Corcoran held that the defendant's sentence was constitutional and should not be reduced. They reasoned that the defendant's crime was serious and it was only through luck that the children were not hurt. They found the majority's decision to invoke the statutory authority of A.R.S. § 13-4037 to be " . . . a disturbing anomaly" that " invites wholesale requests for appellate resentencing under the statute, assuming the statute survives."

Justices Zlaket and Feldman found the sentence both to be unconstitutional and concurred with the use of A.R.S. § 13-4037(B) as the authority to reduce the sentence. They took exception with Justice Martone's opinions on *Bartlett*. In examining a sentence for the aspects of cruel and unusual punishment, they argue that the facts and circumstances of the crime must be reviewed to determine if the sentence is disproportionate. "All defendants are not alike, just as all crimes, even if given the same label, are not identical . . . If this court were to ignore the particular facts and circumstances of each case, we would effectively be relinquishing our obligations to examine the constitutionality of sentences to the legislature, which has the power to define crimes, and the prosecutor, who has the authority to charge."

Maricopa County Public Defender's Office v. Superior Court in Maricopa County, 220 Ariz. Adv. Rep. 83 (1996) - The trial court should give great weight to a representation by counsel that there is a conflict, especially if the counsel is appointed by the court rather than private counsel.

The Public Defender's Office moved to withdraw from two different cases after the assigned deputy public defenders learned that the Office had represented individuals associated with each of the

cases. In completing reviews of the files of these individuals, the attorneys discovered confidential information that could impeach their testimonies. The attorneys' motions to withdraw were denied by two different judges who advised that the attorneys' avowals of conflict were not sufficient and they would need to provide additional information so the court could decide if a conflict existed. The Public Defender's Office filed a special action.

The court of appeals, relying upon *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *State v. Davis*, 110 Ariz. 29 (1973), held the trial courts abused their discretion in denying the motions to withdraw. "The trial court should give great weight to a representation by counsel that there is a conflict, particularly in the case where the counsel has been appointed by the court rather than retained by the defendants." *Davis* at 31. The trial court can explore the adequacy of the attorney's representations concerning the conflict " . . . without improperly requiring disclosure of the confidential communications of the client." *Holloway* at 486-487.

State v. Craig, 214 Ariz. Adv. Rep. 11 (1996) - Delay caused by DNA testing is not extraordinary circumstance.

The defendant was convicted of sexual assault, kidnaping, burglary, aggravated assault, and unlawful means of transportation. He appealed the convictions, arguing the court denied his right to a speedy trial in accordance with Rule 8 of the Arizona Rules of Criminal Procedures. The court of appeals concurred with the defendant.

The defendant went to trial 181 days after his arraignment and 81 days past the Rule 8.2(b) deadline. The state argued that the trial court properly excluded these intervening days to allow the state to complete DNA testing and to accommodate the congestion of the court calendar. The court of appeals concluded the exclusion of time based upon the delayed DNA testing was not extraordinary ' . . . if delay is caused by the State's inertia in gathering its evidence or preparing its case." In addressing the issue of court congestion, the court of appeals noted, "The record in this case does not indicate that any application was made to the Chief Justice of the Arizona Supreme Court for suspension of the Rules of Criminal Procedure precludes the court from excluding the seven days from computation."

As part of its conclusion, the court of appeals held the trial court violated the defendant's right to a speedy trial and dismissed the charges against him. The matter was remanded to the trial court to determine if this dismissal was with or without prejudice.

Coconino County Public Defender v. The Honorable Charles Adams, 206 Ariz. Adv. Rep. 14 (1995) - Defending persons found guilty except insane and committed to the state psychiatric security review board at a hearing before the board to determine if she could be released is outside the scope of the Public Defender statute and the Public Defender should not be appointed.

Joleen Ovind was found guilty except insane by the court and was committed to the state psychiatric security review board. Following her conviction, she requested a hearing before the board to determine if she could be released. Judge Adams appointed the Public Defender to represent her in this proceeding. The Public Defender moved to withdraw as counsel, arguing that such representation was outside the statutory duties outlined in A.R.S. § 11-584. Judge Adams denied the motion, reasoning that because the board hearing was a "stage of the criminal proceeding" the Public Defender could represent

her.

The court of appeals concluded ". . . that the trial court may not appoint a public defender in such a case . . . The duties of the public defender are clearly enumerated in A.R.S. § 11-584(A) . . . Our supreme court has twice held that the language of A.R.S. § 11-584 is clear and unambiguous and prohibits public defenders from defending persons outside the scope of the statute."

Zarabia v. Bradshaw, Presiding Judge of Yuma County, 210 Ariz. Adv. Rep. 3 (1996) - Appointment of contract and private attorneys to represent indigent criminal defendants.

To provide criminal representation to indigents in Yuma County, Judge Bradshaw established a system in which contract and private attorneys were appointed on a rotational basis. These attorneys may or may not have been practicing criminal law at the time of their appointments. All appointed attorneys were required to accept the cases assigned to them. Two appointed private attorneys, one contract attorney, and a criminal defendant filed a special action with the Arizona Supreme Court. They sought orders:

1) to vacate their appointments;
2) to require the scheduling of evidentiary hearing on the issues of competence and excessive case loads; and
3) a declaration that defendants represented by lawyers appointed under the present system are presumably receiving ineffective assistance of counsel.

The Arizona Supreme Court began by holding that:

> . . . the Yuma County system of appointing private attorneys for indigent defendants offends the requirements of the statute and rule. First, appointment of lawyers on a random, rotational basis does not take 'into account the skill likely to be required in handling a particular case' Ariz.R.Crim.P 6.5(a) . . . We do not share [Judge Bradshaw's] optimism that an attorney . . . who has no trial or criminal experience, can become reasonably competent to represent a defendant . . . charged with a very serious crime, simply by having a mentor with whom to consult as the need may be perceived and the occasion arise.
>
> Yuma County is obligated by A.R.S. § 13-4013 and Rule 6.5(c) to provide appointed counsel and pay such counsel reasonable and equitable compensation. Even a brief analysis of the county's system reveals that it fails to meet this standard . . . A compensation scheme that allows significantly less than their overhead expense is obviously unreasonable . . . It is impermissible for the presiding judge, in wholesale fashion, to transfer the public's constitutional obligation to pay the financial cost of indigent defense to the county's private lawyers.

The Arizona Supreme Court also addressed the matter in which Judge Bradshaw rejected, without a hearing, a contract attorney's letter expressing her concern that her case load was becoming excessive and she did not feel she could ethically accept further appointments. "This court established presumptive case load ceilings for criminal defense counsel in *State v. Joe U. Smith*, 140 Ariz. 355, 681

P.2d 1374 (1984). In that case, we pointed out the ethical obligation of defense counsel to manage their professional responsibilities so as to ensure that they are able to provide adequate representation to every client." The Arizona Supreme Court indicated the defense attorney's request for a hiatus of assignments should not have been summarily denied.

> For the reasons set forth above, we hold that the practice of rotational appointment of private attorneys adopted by Respondent violates both A.R.S. § 13-4013 and Rule 6.5(c) . . . On a cautionary note, however, nothing we say here should be interpreted as limiting a judge's inherent authority to achieve justice by appointing a particular lawyer to represent a defendant or litigant in a particular case, even if the appointment is pro bono or causes a financial hardship to the appointed lawyer. There is a stark distinction, however, in requiring a lawyer to handle one case or a few and in conscripting lawyers to regularly handle all cases regardless of their ability or willingness to do so. We do not believe the court's inherent authority can extend so far. Whatever appointment process a court adopts should reflect the principle that lawyers have the right to refuse to be drafted on a systematic basis and put to work at any price to satisfy a county's obligations to provide counsel to indigent defendants.

JNS Holding v. Superior Court (Ener G Corp.), 196 Ariz. Adv. Rep. 44 (1995) - Time period for appeal from justice court is ten days.

The time for an appeal from justice court is controlled by Superior Court Rules of Appellate Procedure and not Arizona Rules of Civil Appellate Procedure. Accordingly, the time for appeal from a justice court judgment and award is 10 days. A post-judgment motion does not extend the time for appeal.

Maricopa County v. Tinney, Rose, and Barker, Judges of the Superior Court, 203 Ariz. Adv. Rep. 3 (1995) - Presiding judge has to provide Board of Supervisors relevant information on funding issues.

Maricopa County, in facing its $67 million deficit, imposed a hiring freeze on December 14, 1995. Judge Rose determined that a bailiff position needed to be filled in Judge Barker's court and informed the Board of Supervisors that if they did not fill the position by January 29, 1996, he would issue orders to fill the position. The Board asked Judge Rose to support his request in writing. The Board felt the response was incomplete and requested that an analyst review the functions of the position. The analyst determined that further study was needed. Judge Rose ordered the Board to fund the bailiff position beginning January 26. A special hearing was held before Judge Tinney of Pima County. Additional information was presented why the position was needed. Judge Tinney ordered the Board to fund the position. The Board of Supervisors filed a special action with the Arizona Supreme Court.

Relying upon *Maricopa County v. Dann*, 157 Ariz. 396 (1988), the Arizona Supreme Court acknowledged that the Board had to show Judge Rose acted "unreasonably, arbitrarily, or capriciously in making the request." The Arizona Supreme Court did not find the Board's request for information on the necessity of the position to be unfair or burdensome. "In fact, information provided in answer to [the

Board's] questions, concerning the possibilities of assigning a retiring judge's bailiff to another division or having two judges share a bailiff, was largely unresponsive. Additionally, much of the submitted documentation was simply irrelevant to the questions asked."

> Today's decision should not be viewed as a retreat from the inherent power of courts to preserve the judicial branch of government and our justice system, even to the extent of ordering, where necessary, the allocation of sufficient funding. Such an extreme measure, however, should be employed only under extraordinary circumstances and as a last resort after reasonable avenues of cooperation and compromise have been exhausted . . . While we have no doubt that the presiding judge was responding in good faith to what he perceived as an unreasonable attempt to restrict and control the operation of the court for which he was responsible, it does not appear to us that the narrow issue presented was sufficient to justify the measures taken here.
>
> Judge Tinney's order was reversed.

State v. Superior Court in Maricopa County, 192 Ariz. Adv. Rep. 47 (1995) - Chronological age, not mental, determines if a victim can testify via video or closed circuit television.

The defendant was charged with sexual assault and sexual abuse after molesting a seventeen-year-old, mentally impaired victim. Because the victim feared seeing the defendant, the state filed a motion under A.R.S. § 13-4253 to allow the victim to testify by video or closed circuit television. The trial court denied this motion, ruling that A.R.S. § 13-4253 applied only to minors who are under the age of 15. The state filed a special action.

The court of appeals held that the trial court was correct in its ruling. "If our legislature wishes to include both a child's chronological and developmental age, it must explicitly do so." Relief was denied.

Zamora v. Superior Court in Maricopa County, 192 Ariz. Adv. Rep. 67 (1995)

In a special action, the court of appeals held that " . . . A.R.S. § 13-604 (U)(a) allows historical prior felony convictions only for those prior felony convictions which mandated imprisonment and either (1) involved the intentional or knowing infliction of serious physical injury, the use or exhibition of a deadly weapon or dangerous instrument, or the illegal control of a criminal enterprise, (2) involved a violation of A.R.S. § 28-697, or (3) involved any dangerous crime against children as defined in A.R.S. § 13-604.01."

Espinoza v. Martin, Judge, Superior Court in Maricopa County, 188 Ariz. Adv. Rep. 70 (1995) - Maricopa County's quadrant B policy to accept no plea agreements that contained stipulated sentences was held to violate Rule 17.4 permitting parties to negotiate and reach an agreement on any aspect of the disposition of the case.

Espinoza challenged the adopted policy of the quadrant B judges to accept no plea agreements that contained stipulated sentences. That policy permitted plea agreements that stipulated to probation or DOC, but precluded those that stipulated to any term of years or to any non-mandatory terms and conditions of probation, or to sentences running concurrently or consecutively, except for DOC time followed by lifetime probation in dangerous crimes against children. Judge Martin had summarily rejected Espinoza's plea agreement which stipulated his sentences would be served concurrently. Espinoza filed a special action with the court of appeals which denied relief, holding that the quadrant B policy was a proper exercise of judicial authority. Espinoza filed a petition for review. The Arizona Supreme Court accepted review.

Noting that Rule 17.4 permits parties to negotiate and reach an agreement on any aspect of the disposition of the case, the Arizona Supreme Court felt that to " . . . ensure that agreements negotiated pursuant to rule 17.4 have some meaningful effect, we interpret rule 17.4 as guaranteeing the parties the right to present their negotiated agreements to a judge, to have the judge consider the merits of that agreement in light of the circumstances of the case, and to have the judge exercise his or her discretion with regard to the agreement . . . Because the quadrant B policy simultaneously limits the content of plea agreements and precludes the exercise of judicial discretion over individual plea agreements, we hold that the policy violates rule 17.4." The Arizona Supreme Court went on to note that " . . . the quadrant B policy violates rule 36, Arizona Rules of Criminal Procedure, because quadrant B adopted a rule that is inconsistent with the Arizona Rules of Criminal Procedure. Even if the quadrant B policy were consistent with the rule of procedure, the policy constituted a local rule that was invalid because quadrant B adopted it without first obtaining the approval of this court. This court has the exclusive power to make rules pertaining to all procedural matters in an Arizona court." The Arizona Supreme Court went on to take exception to Judge Martin's contention that the quadrant B policy was an "experiment". Even if it were an experiment, "the judges are still subject to the provisions of rule 36.

Justice Martone dissented with Justice Zlaket dissenting in part. Justice Martone felt the policy conformed to rule 17.4 and was a creative way to improve the criminal justice system. He did not believe the Arizona Supreme Court has "been at the forefront of reform in the criminal justice system." Justice Zlaket felt the policy was an unapproved local rule, but felt judges "should be able to summarily reject (plea agreements) containing stipulated sentences for that reason alone, without having to go through the charade of considering each case individually."

State of Arizona v. Superior Court in Maricopa County, 182 Ariz. Adv. Rep. 16 (1995)

Alvaro Ochoa was arrested and detained for drug sales. At his arraignment, he was advised of the trial date. Subsequently, the court granted the defense request to reset the trial date. Ochoa was not present when the new date was established by minute entry. A month later, Ochoa escaped from jail and remains at liberty. The state filed a motion before Judge Galati to try Ochoa *in absentia*. Judge Galati recognized that Ochoa had not received personal notice of the new trial date but concluded he had no intention of appearing for trial no matter when it was set. Accordingly, he granted the motion to try Ochoa *in absentia*.

Before the new trial date was set, Judge O'Toole assumed Judge Galati's criminal calendar. The defense filed a motion before Judge O'Toole arguing the same issues of fact and law as were heard by Judge Galati. Judge O'Toole vacated Judge Galati's order as being ". . . contrary to Rule 9.1 and existing case law and facts." The state sought a special action.

The court of appeals cited several cases in which voluntary absence has been inferred to support a waiver of the right to be present at trial under circumstances that did not include a defendant's knowledge of the actual trial date. *Cook*, 115 Ariz. 146; *Fettis*, 136 Ariz. 58; *Pena*, 541 P.2d 406; 670 F.2d 117; *U.S. v. Mera*, 921 F.2d 18. Accordingly, the court of appeals concluded ". . . it was within Judge Galati's discretion to find that (the) defendant had voluntarily absented himself within the meaning of Rule 9.1 to effectively waive his right to be present at trial, thus warranting his trial *in absentia*. We also conclude this ruling was reasonably supported by both the facts of this case and existing case law. For that reason, it constituted an abuse of discretion . . . to vacate that order on defendant's motion for reconsideration." Judge Galati's order was reinstated.

State v. The Honorable Michael Brown, 182 Ariz. Adv. Rep. 20 (1995)

In justice court, two defendants requested a certified court reporter be present for their preliminary hearings. They were told none would be present because local rules of practice in Pima County allowed the presiding judge to authorize videotape, audiotape or a court reporter for justice or police courts. Judge Brown, as presiding judge, had not authorized funds for court reporters for either of these courts. Since Ariz.R.Crim.P. 5.2 requires the presence of a court reporter at all preliminary hearings unless waived by both parties, a special action was initiated.

Relying upon *State ex rel. Corbin v. Superior Court*, 138 Ariz. 500 (1984), in which the Arizona Supreme Court ". . . held that when there is a conflict between a local procedural rule and the rules of criminal procedure, the criminal rules prevail," the court of appeals held Judge Brown exceeded his jurisdiction in denying a court reporter in this matter.

Scarborough v. Superior Court in Yuma County, 184 Ariz. Adv. Rep. 7 (1995) - Rule 17.4(g) does not require automatic disqualification of a trial judge simply because he rejected the plea agreement based on the victims' statements at the change of plea hearing.

Scarborough entered into a plea in which several other counts would be dismissed. At the change of plea hearing, the counsel for the victims objected to the plea agreement. After the defendant admitted to the court his guilt for all the charges, the court rejected the plea agreement ". . . finding that

judicial economy should not be a very great consideration where such serious allegations are involved and that the state appeared able to prove the allegations at trial." The defendant requested a change of judge, noting that ". . . although the presentence report had not yet been prepared, the court had been privy to similar prejudicial information regarding defendant's guilt during the change of plea hearing." The court denied the request. The defendant sought a special action based upon *Chavez v. Superior Court*, 174 Ariz. Adv. Rep. 34 (1994).

In its ruling, the court of appeals declined to extend the Rule 17.4(g) automatic disqualification to this case " . . . solely on the potentially prejudicial information to which the victims' statements may have exposed the court." Rule 17.4(g) does not apply, the court held, because no presentence report had been submitted. "We hold that Rule 17.4(g) does not require automatic disqualification of a trial judge simply because he rejected the plea agreement as too lenient based on the victims' statements at the change of plea hearing."

Juvenile

General Principles

Proposition 102 cannot be imposed retroactively. *Saucedo v. Superior Court in La Paz County*

Juveniles adjudicated delinquent for attempted sex offenses are required to complete DNA testing, just as is the case with adults in *State v. Lammie*. *Sean M.*

A juvenile may be assessed only partial restitution after the court considers the juvenile's age, physical and mental condition and earning capacity. *Eric L*

Adjudication/Delinquency Issues

In re Cesar R., 309 Ariz. Adv. Rep. 36 (1999) - Statute prohibiting possession of firearms by minors in only Maricopa and Pima Counties is unconstitutional.

The juvenile was adjudicated delinquent on one count of a minor in possession of a firearm, Arizona Revised Statutes § 13-3111 and disorderly conduct. This statute limited is applicability to those counties with populations of more than five hundred thousand persons. Relying upon Article IV, part 2 §19(7) of the Arizona Constitution which prohibits the enactment of local or special laws involving the punishment of crimes and misdemeanors, the court of appeals found it to be unconstitutional. It did not accept the state's argument that juvenile street gangs were limited primarily to Pima and Maricopa Counties. It questioned further how the legislature was addressing a "statewide concern" when it enacted it and them limited its application to the two largest counties. Since it was the legislature's intent to apply it to only those two counties, the court of appeals could not sever the limiting section of the statute without offending this intent. Accordingly, the entire statute was held to be unconstitutional. The juvenile's adjudication under this statue was vacated. The remaining adjudication for disorderly conduct was affirmed.

Katherine S. v. Foreman, 305 Ariz. Adv. Rep. 14 (1999) - A.R.S. § 8-235, providing the court with "power to direct behavior of others who may harm juvenile" is unconstitutional.

Katherine's twin brother had been adjudicated delinquent and ordered to appear before the juvenile drug court, which monitors juveniles who have a drug problem while they are on probation. A pipe for smoking marijuana was found in his room. He claimed it was his sister's, Katherine's. The juvenile court, on its own motion, subpoenaed the children's mother and told her to bring Katherine to a drug court hearing without further notice as to the purpose of the hearing.

At that hearing, Katherine was not represented by counsel, was not told that she had a right to

counsel, and was not advised that she had the right to remain silent. Katherine denied that the pipe was her, but acknowledged that she did have a pipe. The court, relying upon A.R.S. § 8-235, ordered Katherine not to use drugs while her brother was involved with drug court, ordered her to provide a urine specimen for testing, and to return to drug court in a week.

During the ensuing weeks, Katherine sometimes failed to appear at drug court and tested positive for marijuana on several occasions. At one point, the judge ordered Katherine to bring her boyfriend to court, but did not pursue this when it was learned that the boyfriend had an outstanding warrant for his arrest.

Eventually, the judge set a hearing to show cause why Katherine should not be held in contempt of court for her failure to abide by the court's orders. Counsel was appointed for Katherine. When she failed to appear, a bench warrant was issued. Katherine filed a special action challenging the validity of A.R.S. § 8-25.

The court of appeals summarily noted that the juvenile court never obtained jurisdiction over Katherine in this case. Moreover, even if it had used Rule 1 (C), as the state argued the juvenile court should have done, the court of appeals was concerned with the manner in which the statute was applied and it vagueness. Writing for the court of appeals, Judge Kleinschmidt stated:

> Setting aside the conceptual problem created by the judge presiding over an inquisitorial proceeding, some of the problems that arose here could be cured by applying the statute in a manner that does not offend the constitution. The process was begun with a subpoena that did not advise Katherine of why she was being summoned to court . . . No real hearing was held when Katherine appeared in court. Instead, the judge interrogated her briefly and entered the orders . . . Katherine was questioned about criminal conduct . . . without being advised that she had a right to remain silent . . . Katherine was entitled to counsel . . . Katherine was subject to urinalysis, which is a significant intrusion on the Fourth Amendment right . . . The order [to submit to drug testing] was legally unfounded and violated Katherine's right to privacy.

The court of appeals went on to determine that A.R.S. § 8-235(B)(2), the part of the statute that allows a judge to order any person to do or refrain from doing anything harmful or detrimental to a delinquent child or that tends to defeat the orders of the court regarding a delinquent child was unconstitutionally vague.

In re Louise C., 307 Ariz. Adv. Rep. 11 (1999) - The use of vulgar language does not necessarily meet the standard for "disorderly conduct."

During a counseling session in the principal's office, the juvenile lashed out at the assistant principal with an outburst of vulgar language and left the office slamming the door. The juvenile was suspended. The state filed a delinquency petition alleging the juvenile had engaged in disorderly conduct by using language likely to provoke physical retaliation. Although the principal testified that neither he nor his assistant wanted to retaliate against the student, the court adjudicated the juvenile delinquent and placed her on probation. She appealed.

The court of appeals reversed the adjudication. Although the court of appeals did not condone the juvenile's language, it found the state failed to prove that the juvenile had used "fighting words" or "seriously disruptive behavior" as required for a violation of the disorderly conduct statute, A.R.S. § 13-2904(A)(3).

In re Julio L., 302 Ariz. Adv. Rep. 5 (1999) - Evidence of actual disturbance is not required to violate the

disorderly conduct statute.

At school with several other students present, the juvenile swore at the principal and kicked a chair over. He was subsequently referred to the juvenile court for disorderly conduct pursuant to Arizona Revised Statutes § 13-2904. The juvenile court adjudicated the juvenile delinquent, finding that his "conduct constituted seriously disruptive behavior" as prescribed by the statute. The juvenile appealed, arguing his behavior did not meet the standard established by the statute. His argument was based upon his belief that no other students or teacher were offended by his conduct.

The court of appeals noted that in *State v. Johnson*, 112 Ariz. 383, 385, 542 P.3d 808, 810 (1975), the Arizona Supreme Court held that evidence of actual disturbance is not required to violate this statute. Instead, this ruling simply required that a person act "with intent to disturb the peace . . ." While Arizona courts have not interpreted disorderly conduct in schools, the court of appeals located several cases from other states. In a 2-to-1 decision, the court of appeals affirmed the juvenile's adjudication.

In re Anthony H., 298 Ariz. Adv. Rep. 59 (1999) - Court can take judicial notice of common knowledge without supporting documents. Rule 609(d), Arizona Rules of Evidence generally precludes the use of prior juvenile adjudication.

The juvenile appealed his adjudication for carrying a concealed weapon. He argued that the juvenile judge erred in taking judicial notice that Maricopa County had more than 500,000 residents, making it illegal for him to have the concealed weapon.

The court of appeals observed that it was common knowledge that the population of Maricopa County exceeded 500,000. It held that the juvenile court did not have to have any documentation before it to support this finding.

The juvenile also appealed the state using his prior adjudication to impeach him. The state relied upon Rule 609(a), Arizona Rules of Evidence. However, the court of appeals noted that section (d) of that rule generally precludes the use of prior juvenile adjudication. While this was error, it was harmless. The juvenile's adjudication and disposition were affirmed.

In re David H., 276 Ariz. Adv. Rep. 15 (1998) - A juvenile probation officer is considered a peace officer.

During a hearing and immediately following his commitment to ADJC, the juvenile picked up a file and threw it at the probation officer, striking him in the face. The juvenile was charged with aggravated assault on a peace officer for which he received an additional three month commitment. The juvenile appealed, arguing the probation officer was not a peace officer.

The court of appeals noted that A.R.S. §8-205(3) provides that an authorized juvenile court officer shall "[h]ave the authority of a peace officer in the performance of the court officer's duties." And according to A.R.S. §8-203, a juvenile probation officer is an authorized juvenile court officer. While there is no Arizona case law expressly holding that a juvenile probation officer is a peace officer, the U. S. Supreme Court has done so in *Fare v. Michael C.*, 442 U.S. 707, 720, 99 S.Ct. 2560, 2569 (1979). The court of appeals agreed and held that a probation officer has the authority of a peace officer in the performance of his or her official duties. The juvenile's adjudication and disposition were affirmed.

In re Franklin V., 260 Ariz. Adv. Rep. 7 (1998) - Disorderly conduct requires more than being loud and profane to a police officer.

Officers observed a group of juveniles surrounding a fallen man and suspected a fight. The man and the appellant walked away as the officers approached. The officers yelled twice to the appellant to stop. He turned to the officers, yelling, "Fuck you, I don't have to say shit to you." The officer "contacted" him to tell him to calm down. When the juvenile pulled away, the officer felt a bulge under the juvenile's jacket. The juvenile continued screaming obscenities to the officers. Eventually, they placed handcuffs on him and found under his jacket a flower he was going to give to his girlfriend. The state charged the juvenile with disorderly conduct. The court adjudicated him delinquent for this offense. The juvenile appealed.

The state relied upon A.R.S. § 13-2904(A)(3) in charging the juvenile with disorderly conduct. This indicates a person commits disorderly conduct if the person: "Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person."

The court of appeals noted this case differs considerably form *State v. Brahy*, 22 Ariz App. 524, 529 P.2d 236 (1974) upon which the state rested its argument. The juvenile did not threaten the officer nor spit on the officer as did Brahy. In this case, the juvenile was, indeed, loud and profane, but more is required for this instance to provoke a police officer to retaliate, especially since officers are trained to deal with volatile situations. The adjudication was reversed.

In re Timothy C., 275 Ariz. Adv. Rep. 43 (1998) - A juvenile's confession induced by promises from the CPS worker was misleading and improper.

The parents took their son to a psychologist when they found him playing with his baby sister's bottom. The psychologist felt the child had no sexual problem but had to report the behavior to CPS. During his first visit, the caseworker determined that appropriate action had been taken by the parents. During the second visit, he assured the mother that if he could speak to the son, he would close out the case. When the boy acknowledge kissing his sister on the bottom, he reported it to the police. He subsequently closed the CPS case, but the state filed a petition for delinquency. The defendant moved to suppress the boy's confession arguing it was involuntary because the caseworker had misled the parents about his promise. The juvenile court denied the motion. The boy was adjudicated delinquent. He appealed.

The court of appeals disagreed with the juvenile court. The caseworker was working for the state and had made a promise to close the case, knowing full well he had to report the action to the police. The court of appeals found that the record contained no information that the boy was aware of his rights and convincing evidence that the confession had been induced by promises from the CPS worker that were misleading and improper. The adjudication was reversed.

In re Charles B., 282 Ariz. Adv. Rep. 24 (1998) - The court can determine a juvenile to be incompetent and later find him restorable, allowing the charge to be refiled.

The court determined, based upon three experts' opinions, that the juvenile was incompetent and not restorable within the statutory six month time period. This was based upon is inability to consult with his attorney with rational understanding and that he did not have an understanding of the proceedings against him. The court dismissed the action without prejudice, believing that something might happen within the six month period to restore the juvenile and allow the state to pursue the matter. The juvenile appealed arguing that the court had to dismiss with prejudice because it had found that the juvenile could not be restored within the statutory limit.

The court of appeals reviewed A.R.S. §§ 8-291.01 to 8-291.04. It held that the juvenile court could find the juvenile incompetent and not restorable and yet believe as in this case that age and maturity would make him restored within six months, thus allowing the charge to be refiled. The order was affirmed.

In re Victor P., 255 Ariz. Adv. Rep. 45 (1997)

The juvenile was remanded to the adult court. He subsequently filed an untimely appeal. The trial court denied the motion. The juvenile appealed.

The first matter the court of appeals addressed was whether or not the juvenile court could hear the delayed appeal from the juvenile. Finding that Juvenile Court Rule 29 permitted the juvenile court to hear delayed appeals, the court of appeals went on to hold that the juvenile's delay resulted from the juvenile's own inconsistent statements concerning his age. Besides, the juvenile judge had ruled that regardless of his age, she felt his behavior warranted a remand to adult court. The juvenile court's order denying the juvenile's motion for a delayed appeal was affirmed.

Leslie C. v. Maricopa County Juvenile Court, 256 Ariz. Adv. Rep. 10 (1997)

Leslie C. applied for preadoption certification with the juvenile court. Despite a favorable report by the adoption agency, the juvenile court denied her request. At a reconsideration hearing, a psychologist, a counselor, and a representative from the adoption agency testified that Leslie was fit to adopt. The juvenile court reaffirmed it previous denial, citing her recent divorce, her past and current mental history, and her relationship with her five children.

The court of appeals affirmed the juvenile court's ruling, emphasizing it was ". . . the trial court's duty to independently assess evidence, and, at times, to make decisions contrary to unanimous recommendations of witnesses."

In re Isaac G., 252 Ariz. Adv. Rep. 34 (1997) - Amending a delinquency petition

A petition was filed alleging the juvenile committed attempted theft. Although the court did not find probable cause for theft, it did find probable cause for trespass. Neither the state nor the court formally amended the petition. The juvenile appealed, arguing the court improperly amended the delinquency petition.

The court of appeals noted a court can amend a petition only (1) when the amended charge is a

lesser-included offense; (2) when the charging document has sufficiently described the amended charge; or (3) when the evidence supports the amended charge. In this matter, the evidence supported the amended charge. The juvenile court's order was affirmed.

Maricopa County Juvenile Action No. JV-512490, 248 Ariz. Adv. Rep. 3 (1997)

The juvenile was adjudicated delinquent on a charge of criminal trespass. The delinquent act involved climbing over a locked gate and walking down a neighbor's driveway. When confronted by the neighbor, she claimed she could walk down the driveway anytime she pleased. The neighbor called the police who went to her home and cited her.

During the juvenile proceedings, the juvenile moved to dismiss the petition contending there was a question of dispute whether she had a right to be on the neighbor's property. The juvenile's family had purchased property next to the neighbor years earlier to maintain horses. When the neighbor bought his house, there had been an agreement that the juvenile's family could use the driveway. The neighbor contended this agreement was limited only to feeding the horses. The juvenile's family maintained that the agreement was broader.

In arriving at his determination to adjudicate the juvenile delinquent, the commissioner did not address the issue whether the juvenile's family had a broader access to the neighbor's property than just to feed the livestock. Since this was unresolved, the juvenile may have had a right to be on the property and the court should not have found her delinquent of criminal trespass. The adjudication was reversed and the matter remanded.

Mohave Co. Juvenile No. J-96-560 v. Superior Court, 245 Ariz. Adv. Rep. 23 (1997)

The juvenile court judge granted the juvenile probation as part of a plea with the state. Later, that same judge accepted a disposition agreement following an allegation of probation violation. When the juvenile appeared a third time before that judge, the juvenile filed a notice of change of judge. The court denied this motion, indicating the juvenile had waived his right to a change pursuant to Juvenile. Ct. R. 20.1(c)(4) Waiver. The juvenile appealed. The court of appeals held that a disposition hearing is a contested hearing for the purposes of Rule 20.1(c)(4).

Pima County Juvenile Delinquency Action No. 12744101, 228 Ariz. Adv. Rep. 66 (1996)

The court adjudicated the juvenile delinquent for possession of marijuana, after the juvenile was found selling marijuana at school. The juvenile appealed arguing that possession of marijuana was not a lesser-included crime of sale of marijuana. The court of appeals rejected this argument and affirmed the juvenile's adjudication.

Pinal County Juvenile Action No. JV-940492, 222 Ariz. Adv. Rep. 15 (1996) - Guidelines are just guidelines. The court can deviate from the guidelines.

The court committed the juvenile to the Department of Juvenile Corrections for fifteen months rather than the six to nine months suggested by guidelines. The court noted that the juvenile had committed three felonies within the past two years, had a high risk of reoffending, had not completed counseling, and had tested positive for drugs. The juvenile appealed.

The court of appeals affirmed the commitment, emphasizing the guidelines were just that, guidelines. A.R.S. § 8-241 requires the court to consider the guidelines, which the trial court did in this matter.

Maricopa County Juvenile Action No. JV-512016, 225 Ariz. Adv. Rep. 52 (1996) - Guidelines are just guidelines. The court can deviate from the guidelines.

The juvenile was placed on probation after admitting to molesting his sister. As a condition of probation, he was ordered to remain at a residential treatment center. When he ran away from the center, he was found in violation of his probation conditions. The juvenile guidelines and matrix indicated a term of nine to twelve months in secure care. The probation officer recommended a term of eighteen to twenty-four months. The juvenile court followed the officer's recommendation. The juvenile appealed, offering as one argument that the court abused its discretion by committing the juvenile for a longer period of secure care than provided by the matrix.

As in *Pinal County Juvenile Action No. JV-940492*, the court of appeals noted the matrix was only a guideline. Moreover, the judge had stated on the record his reasons for departing from the guidelines. The commitment was affirmed.

Navajo County Juvenile Action No. JV-94000086, 193 Ariz. Adv. Rep. 52 (1995) - Juvenile cannot waive right to counsel.

On two occasions the juvenile appeared before the court without counsel, parent, or guardian and waived his right to counsel and admitted the allegations. He was ordered to remain in detention until further order of the court.

On order of the court of appeals, the juvenile was appointed counsel for his appeal procedures. The court of appeals granted a stay pending the outcome of the appeal. In summary, the court of appeals held, "Juvenile appeared before the court for his advisory and disposition hearings without benefit of counsel, parent or guardian. Juvenile was permitted to waive counsel and make admissions against his interest in violation of A.R.S. § 8-225. Accordingly, we hold that juvenile was denied his statutory right to counsel." The order of delinquency and disposition were reversed.

Maricopa County Juvenile Action No. JV-510312, 198 Ariz. Adv. Rep. 5 (1995) - The juvenile court can consider dismissed charges in determining an appropriate disposition.

A delinquency complaint was filed against the juvenile charging theft, trafficking in stolen property and possession of a weapon. The juvenile admitted the theft. The other charges were dismissed. At the disposition, the judge placed the juvenile on intensive probation because he was concerned with the weapon and trafficking charges. The juvenile appealed since he was not found guilty of these charges.

The court of appeals, relying upon *Williams v. New York* [337 U.S. 241 (1949)] and *Williams v. Oklahoma* [358 U.S. 576 (1959)], noted that a sentencing court may consider reliable evidence of behavior

that has not resulted in a conviction and unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and characteristics. Accordingly, the court of appeals affirmed the disposition.

Maricopa County Juvenile Action No. JV-50789, 183 Ariz. Adv. Rep. 45 (1995) - The court can impose different dispositions when the juvenile is found delinquent of more than one charge. DYTR and JIPS can be imposed.

The juvenile admitted to a count of attempted carrying a concealed weapon. Subsequently, a second petition was filed for robbery, aggravated assault and misconduct with a weapon. He was found delinquent on these charges. At a consolidated disposition hearing, the juvenile was committed to Arizona Department of Youth Treatment and Rehabilitation (DYTR) on several counts and to Juvenile Intensive Probation Supervision (JIPS) on the last count. JIPS was to begin upon release from DYTR. The juvenile appealed, arguing the court exceeded its authority by ordering both DYTR and JIPS since A.R.S. § 8-241(A) did not permit both for the same delinquency petition.

The court of appeals disagreed and distinguished this matter from *Juvenile Action No. J-74275*, 117 Ariz. 317 (1977). In that matter, the juvenile was adjudicated of one delinquent act and committed to DYTR, to be followed by probation. Emphasizing that the Arizona Supreme Court has recognized protection and rehabilitation of the juvenile as the objective of the juvenile system [*State v. Berlat*, 146 Ariz. 505 (1985) and *Arizona State Department of Public Welfare v. Barlow*, 80 Ariz. 249 (1956)], the court of appeals concluded ". . . that restricting the juvenile court to one disposition for each delinquency petition regardless of the number of counts . . . would inhibit the court's ability to tailor dispositions to the needs of each juvenile offender." The court held ". . . A.R.S. § 8-241(A) authorizes the juvenile court to order one disposition for each count that a juvenile offender is adjudicated delinquent. Here, however, the court's disposition order is unclear because it placed (the juvenile) on JIPS upon his release from DYTR. The court's use of the term "release" is open to two interpretations: discharge from DYTR's jurisdiction pursuant to A.R.S. § 41-2820 or upon release from a secured facility. The first interpretation would constitute an appropriate order because the JIPS placement would occur only after (the juvenile) was discharged from the jurisdiction of DYTR." The matter was remanded to clarify the "release" question.

JV-32324 v. Superior Court in Maricopa County, 184 Ariz. Adv. Rep. 54 (1995)

As part of an appeal by two juveniles, the court of appeals declared ". . . the juvenile court's administrative order containing a blanket appointment of the public defender's office at the commencement of every delinquency matter is void." Judge McDougall issued this administrative order in 1993 to improve the juvenile court operations and to allow accelerated discovery to the public defender's office to determine if there was a conflict. In voiding the order, the court of appeals reasoned that ". . . appointment of counsel in the administrative order conflicts with the procedural protections afforded by Juvenile Rule 6. Because the blanket appointment occurs prior to the initial hearing, a juvenile is not informed of his rights prior to appointment of counsel and is not given an opportunity to waive counsel or retain counsel of choice. Furthermore, the juvenile court binds the juveniles to the acts or omissions of their automatically-appointed counsel."

Coconino County Juvenile Action No. J-12187, 178 Ariz. Adv. Rep. 43 (1994) - the juvenile's "residence" or "domicile" remained in Coconino County even while he was incarcerated in Maricopa County.

In 1991, the Juvenile Court in Coconino County adjudicated the juvenile delinquent for crimes committed in that county and placed him on probation. Subsequently that probation was revoked and the juvenile was committed to the Adobe Mountain Juvenile Institution in Maricopa County. He was released on parole and returned to Coconino County. In 1994, the juvenile committed several armed robberies. He was eventually returned to Adobe Mountain where he committed another series of crimes. The Juvenile Court in Coconino County transferred the juvenile to the adult court for the offenses committed in Maricopa County. The juvenile court then ordered the case transferred to Maricopa County for trial. The juvenile appealed asserting that Coconino County was not the appropriate forum to consider his transfer to adult court.

The court of appeals upheld the juvenile court's action. The court of appeals noted A.R.S. § 8-206 provides:

> A. The venue of proceedings in the juvenile court shall be determined by the county of the residence of the child, of the county where the alleged delinquency, dependency, or incorrigibility occurred or is committed.
> B. Where the residence of the child and the situs of the alleged delinquency, dependency or incorrigibility are in different counties, invoking proceedings in one county shall bar proceedings in the others.

The court of appeals noted the juvenile's "residence" or "domicile" remained in Coconino County even while he was incarcerated in Maricopa County. Therefore, Coconino County was a proper venue for the delinquency petition and for hearing the motion to transfer for prosecution as an adult.

The court of appeals went on to explain that it relied upon the venue statute and not on the *Yavapai County Juvenile Court Action No. A-27789*, 140 Ariz. 7 (1984) cited by the state. By using the venue statute, it would be proper to bring proceedings for a single offense in more than one county. However, the statute requires that there may be only one proceeding and one adjudication for each offense. This would preclude any problem of double jeopardy or double punishment. Accordingly, the court of appeals observed that it is possible for a juvenile to commit offenses in different counties, the juvenile then could be treated as an adult in one county and as a juvenile in the others. "There is nothing necessarily inappropriate about this, and nothing in our law forbids it." The order transferring the juvenile to the adult court in Maricopa County was affirmed.

Maricopa County Juvenile Action No. JV-506561, 180 Ariz. Adv. Rep. 8 (1994) - The juvenile court can adjudicate a delinquent for a lesser-included offense. The trial court can deny the juvenile's request to have an attorney present at a court-ordered mental examination.

The juvenile was accused of first degree murder in the killing of her mother. After hearing evidence on the juvenile's abuse by the victim, the juvenile court adjudicated her delinquent for the lesser-included offense of manslaughter. The juvenile appealed. Relying upon *State v. Reid*, 155 Ariz. 399 (1987), she contended she was either guilty of first degree murder or not guilty.

The court of appeals upheld the manslaughter conviction. The evidence of the Battered Child Syndrome convinced the court that she acted "in the heat of passion" and the manslaughter conviction was appropriate. In a second point of appeal, the court upheld the trial court's denial of the juvenile's request to have her attorney present at a court-ordered mental examination. Relying upon *State v. Schackart*, 175 Ariz.

494, the court of appeals held that the counsel's presence during a psychiatric examination is not required to ensure a defendant's right to a fair trial.

S.S. v. Superior Court in Maricopa County, 161 Ariz. Adv. Rep. 42 (1994) - The juvenile court did not have to adhere to civil procedures to determine the extent of discovery.

Special action was brought to the court of appeals by the father of children alleged to be dependent. The juvenile judge denied the father's request that the Department of Economic Security (DES) comply with the extensive pretrial discovery requirements of Rule 26.1 of the Arizona Rules of Civil Procedure before proceeding to hearing. The court of appeals confirmed *Yavapai County Juvenile Action No. 7707*, 25 Ariz. App. 397 (1975), holding that juvenile proceedings are governed by the Rules of Procedure for Juvenile Court. It held that in instances where the juvenile rules are silent and the civil rules are readily adaptable, it may be appropriate to resort to the civil rules. Such was not the case in this matter. The court went on to state it did not hold that in every dependency case, discovery was limited to the DES report. Rather, it felt the juvenile court had the inherent power, on a case-by-case basis, to order such discovery as it deems necessary. Relief was denied.

JV-130549 v. Superior Court, 161 Ariz. Adv. Rep. 39 (1994) - In Rule 3, "incorrigible acts" should be included with "delinquent conduct."

In a special action, the 15-year-old appealed the juvenile judge's ruling to order his detention once he was determined to be incorrigible. The juvenile admitted to an allegation that he had run away from home as alleged. The court found that " . . . the child's best interest requires necessary protection . . . This Court believes that if the child is released, he presents a serious danger to himself and, therefore should be detained pending Disposition". The juvenile appealed, relying upon Rule 3(d) that "No child shall be held in detention for more than 24 hours . . . " Contending that he was incorrigible, not delinquent, the juvenile argued the court had no authority to detain him for more than 24 hours.

The court of appeals found that the juvenile had made a legitimate argument based on a drafting ambiguity in Rule 3, but concluded that the ambiguity should be resolved by interpreting the rule to include "incorrigible acts" with "delinquent conduct". The Court went on to distinguish this matter from *Gila County Juvenile Action No. DEL-6325 v. Duber*, 169 Ariz. 47 (1991), which involved post-disposition detention rather than pre-disposition detention as in this case. Relief was denied.

Maricopa County Juvenile Action No. JV-500210, 153 Ariz. Adv. Rep. 11 (1993) - Unlike adults, juveniles do not have the right to reject probation.

After the court adjudicated the juvenile delinquent, she requested probation for the assault charge. Instead, the court chose to place her on intensive probation. The juvenile refused to sign the conditions of her intensive probation. Citing *State v. Montgomery*, 115 Ariz. 583, she subsequently appealed, arguing that she had the right to reject probation and choose incarceration instead. She argued that since adults have the right to choose, so do juveniles because the concept of equal protection of the laws applies to them.

The court of appeals noted that the concept of equal protection does apply to juveniles in some

respects, for example, where the right to counsel or the privilege against self-incrimination is concerned (*Gault*, 387 U.S. 1). However, Arizona cases have held that the concept of equal protection does not require that the state always treat juveniles in the same manner as adults, citing the following: *Maricopa County Juvenile. Action No. J-86509*, 124 Ariz. 377, where longer penalties may be imposed on juveniles than adults; *Maricopa County Juvenile. Action No. J-81405-S*, 122 Ariz. 252, in which prosecution of a juvenile by a petition rather than by complaint is permitted; and *Maricopa County Juvenile. Action No. J-72804*, 18 Ariz. 560, in which different appeals procedures are permitted. "Equal protection requires only that where there are reasonable grounds for establishing different classifications, individuals within the same class be treated equally." Although *Montgomery* allowed adults to choose incarceration over probation, the court of appeals felt that " . . . juveniles are less likely than adults to have the knowledge, experience and maturity to determine what is in their own best interest." Also relying on the difference in sentencing purposes, rehabilitation versus punishment, the court of appeals rejected the juvenile's appeal. "Unlike adults, juveniles do not have the right to reject probation." As a footnote, the court noted that the juvenile is following the conditions of intensive probation even though she asserts that she is not on probation.

Maricopa County No. JV-114857, 143 Ariz. Adv. Rep. 41 (1993) - To dismiss with prejudice under Rule 6.1, the trial court must find that a time limit has been violated and that justice requires dismissal with prejudice.

The court dismissed several delinquency acts against the juvenile with prejudice when the prosecutor could not provide evidence that the missing witnesses had ever been served with notices to appear. The court of appeals was asked to determine when the juvenile court could dismiss charges with prejudice. In summary the court of appeals found that " . . . the court may not dismiss a juvenile prosecution with prejudice unless the court finds that justice requires it . . . To dismiss with prejudice under Rule 6.1, the trial court must find that a time limit has been violated and that justice requires dismissal with prejudice. Lastly, Rule 14 only allows for dismissal without prejudice."

Romley v. Superior Court in Maricopa County, 133 Ariz. Adv. Rep. 38 (1993)

The juvenile court transferred one charge against the juvenile to adult court while retaining five counts in juvenile court. The court of appeals held that if the juvenile court decides to transfer a juvenile to adult court, it must transfer all the charges growing out of that criminal event and may not retain some of them.

Maricopa County Juvenile Action No. JV. 121430, 123 Ariz. Adv. Rep. 18 (1992)

The 13-year-old was adjudicated delinquent for placing his fingers in a 3-year-old's vagina causing bruising and bleeding. The defense provided a psychologist who felt the behavior was inappropriate but not necessarily deviant for a 13-year-old. On appeal, the defense argued that the juvenile had not shown " . . . any unnatural sexual interest with respect to children" and should not have been adjudicated delinquent.

The court of appeals reviewed changes in the molestation laws which were intended " . . . to protect children from *any* and *all* indecencies which tend to humiliate them [emphasis added]." Thus the previous requirement of "unnatural or abnormal" sexual interest standard had been modified by statute to simply a "sexual interest" standard. The court denied the appeal finding the juvenile never denied the acts, just

the intent.

Gila County Juvenile Action No. Del. 6325 v. Duber, 94 Ariz. Adv. Rep. 76 (1991)

The juvenile court does not have jurisdiction (legislative authority) to impose a period of detention as punishment for incorrigibility.

Maricopa County Juvenile Action No. JV119590 & No. JV118201, 810 P.2d 589 (1990) - *Hinson* does not apply to juveniles charged with DUI.

Juveniles were charged with DUI and DUI over .10%. The juvenile judge dismissed with prejudice the charges because the state failed to try the juveniles within 150 days of arrest *(Hinson*). The court of appeals held that there is no rule requiring juveniles charged with DUI to be tried within 150 days. The Rules of Criminal Procedure do not apply in juvenile delinquency proceedings. These rules " . . . only serve as a familiar vehicle to achieve due process ends."

Cochise County Juvenile Delinquency No. DL 88-00037, 793 P.2d 570 (1990)

Testimony of the minor's probation officer, who was familiar with his juvenile record, was admissible in proceeding to transfer minor to superior court for prosecution as adult; any failure of the officer to conduct adequate investigation prior to preparing report was a matter which went to the weight of testimony, not to its admissibility.

Novak v. State, 792 P.2d 293 (1990)

The juvenile court may suspend the license of a juvenile who used a false identification to buy alcoholic beverages.

Maricopa County Juvenile Action No. JV-114428, 770 P.2d 394 (1989) - The court can suspend a juvenile's drivers license until the 18th birthday.

The juvenile was adjudicated a delinquent in the Superior Court of Maricopa County, and his driver's license was ordered suspended until his 18th birthday, pursuant to statute. The juvenile appealed.

The court of appeals held that statute requiring mandatory suspension of driver's license for drug-related offense did not deprive juvenile of his equal protection and due process rights. The statute providing for mandatory suspension of license of juvenile drug offenders, until they reach age 18, did not deprive defendants of equal protection guarantees because there is no similar provision to punish adult drug offenders. Since the statute served a legitimate state purpose of preventing drug abuse and there were procedural safeguards prior to imposition of suspension, the court of appeals upheld the conviction.

JV-111701 v. Superior Court in Maricopa County, 786 P.2d 998 (1989)

Juveniles may not be held over Saturdays, Sundays, or holidays without having a detention hearing. In Juvenile Rule 3(b) "reasonable grounds" is the same as "probable cause."

Romley v. Superior Court in Maricopa County, 787 P.2d 1074 (1989)

Juvenile Rules 12(b), 12(c) and 14(b) allow the court to request a psychological report on a juvenile and consider the report without calling the author. The report is the court's own record, prepared by its agents for its own use. The court erred in ruling it was hearsay.

Dependency/Severance

Meryl R. v. Ariz. Dept. of Economic Security, 311 Ariz. Adv. Rep. 17 (1999)

In her capacity as guardian ad litem for 13-year-old David, Meryl filed a dependency petition. She noted that David's mother, who lives in Kansas, has legal custody but that David lives here with his father. She also noted that dependency proceedings had been initiated in Kansas on behalf of David's half-siblings and that those children had been placed outside the home. Meryl had requested a dependency hearing so that the juvenile court would declare David dependent and thus create a legal basis for the father's exercise of care and control over David. The juvenile court dismissed the petition. Meryl appealed.

The court of appeals affirmed the trial court's dismissal of the petition because there was no statutory element of dependency present. The father would have to seek custody in an appropriate forum.

Don L., vs. Ariz. Dept. of Economic Security, 293 Ariz. Adv. Rep. 12 - Nothing in the rules or statutes allows the court to sever parental rights by "default" solely because the parent fails to attend a status hearing.

When the juvenile's father and his attorney failed to appear for a status hearing on a contested severance action, the court "defaulted" the parents for failing to appear and found that they had admitted the allegations of the petition. After DES presented testimony, the court severed the parental rights. When the father filed a motion for relief from the final judgement, the court denied the motion finding the default was not the result of excusable negligence. The father appealed.

The court of appeals found nothing in the rules or statutes that allowed the court to sever parental rights by "default" solely because the parent fails to attend a status hearing. The court's order denying the father's motion was set aside, the severance order was vacated, and the matter remanded.

Toni W. v. Ariz. Dept. of Economic Security, 293 Ariz. Adv. Rep. 16 (1999) - there is no constitutional due process that requires ADES to provide the mother with reunification services before seeking severance of her parental rights. ADES made diligent efforts to locate the mother and that she had abandoned the child without just cause.

After the homeless mother delivered her son, she returned to the shelter and was subsequently incarcerated for probation violations. During this time she made no effort to contact ADES concerning her baby which had been placed in the custody of ADES. ADES made numerous attempts to locate the mother and finally found her in jail where she was served with the notice to sever her rights. Only then did she contact ADES and request visitation which was denied. ADES offered no services to attempt to reunify the family. At the severance hearing, the juvenile court found that the mother had failed to maintain normal parental relationship with the child and that she had abandoned the baby. The mother's rights were terminated. The mother appealed arguing that ADES had a duty to make a concerted effort to unify the family before terminating parental rights.

The court of appeals held that there was no constitutional due process that required ADES to provide the mother with reunification services before seeking severance of her parental rights. The court of

appeals also found sufficient evidence to support the trial court's finding that ADES made diligent efforts to locate her and that she had abandoned the child without just cause. The juvenile court's order terminating the mother's parental rights was affirmed.

In re the Matter of Granville v. Dodge, 287 Ariz. Adv. Rep. 67 (1999)

The court of appeals held that grandparents are entitled to reasonable visitation.

William Z. v. Arizona Department of Economic Securities, 279 Ariz. Adv. Rep. 15 (1998) - The juvenile's paternal grandfather and step-grandmother's should be allowed to intervene in the dependency action.

The juvenile court denied the paternal grandfather and step-grandmother's motion to intervene in the dependency action. They appealed.

The court of appeals turned to *Bechtel v. Rose*, 150 Ariz. 68, 722 P.2d 236 to determine if the grandfather had standing to intervene. DES contended that because *Bechtel* involved parentless children and the current children were not parentless, that case did not apply. The court of appeals disagreed. *Bechtel*, while viewed as a case for grandparent's rights, was foremost about the best interest of the children. In the current matter, since the children were living with the paternal grandmother in another state and the DES had not been able to monitor the home, the court of appeals reasoned that the paternal grandfather, who claimed his ex-wife was unfit to have the children, might have more knowledge of the home setting in which the children were living. For that reason, the court of appeals vacated the juvenile court's order denying the grandfather's motion to intervene.

Mary Ellen C., v. Arizona Department of Economic Security, 287 Ariz. Adv. Rep. 41 (1999) -The state is obligated to undertake those rehabilitative efforts which offer a reasonable possibility of success.

In this matter, the court of appeals affirmed that in addition to making all reasonable efforts to preserve the family relationship (*Maricopa County Juv. Action No. JS-6520*, 157, Ariz. 238, 241, 756 P.2d 335, 338 (App. 1988)), the state also is obligated to undertake those rehabilitative efforts which offer a reasonable possibility of success. In this matter, the court found that the Department of Economic Security made no such effort and reversed the juvenile court's termination order.

Denise H. v. Ariz. Dept. of Economic Security, 285 Ariz. Adv. Rep. 3 (1999) - There are rare instances when there were no appealable issues, and in those rare instances where there are no arguable issues, there is nothing in A.R.S. §8-236(D) which would require counsel to file a frivolous brief.

After the juvenile court severed the mother's rights, her attorney filed a brief with the court of appeals to review the record for fundamental error pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed. 2d 493 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). She based her brief upon the argument that severance proceedings and criminal proceedings were sufficiently similar to warrant *Anders*

and *Leon* reviews.

The court of appeals disagreed with the conclusion drawn by the mother's attorney. A severance proceeding is civil in nature and does not provide the same constitutional guarantees afforded a criminal defendant. The court went on to disagree with counsel's contention that absent a right to file an *Anders* brief she was in an ethical dilemma posed by A.R.S. §8-236(D) to represent the mother on appeals when she did not feel there were appealable issues and ER 3.1, Rule 42, Ariz. R. S. Ct., 17A A.R.S. which prohibits her from pursuing a matter she feels has no merit and ER 3.3, Ariz. R. S. Ct. 42 the requirement to be candid with the court. The court of appeals felt there were rare instances when there were no appealable issues, and in those rare instances where there are no arguable issues, there is nothing in A.R.S. §8-236(D) which would require counsel to file a frivolous brief.

Michael J. v. Dept. of Economic Security, 289 Ariz. Adv. Rep. 7 (1999) - To sever parental rights, there must be some showing a prison sentence is of such length that it will significantly and detrimentally impact the child's home life. To sever for unfitness, the felony must directly demonstrate the individual's substantial unfitness to parent, as opposed to the general character defects reflected by the commission of any felony.

Michael J. was sentenced to 3.5 years in prison for aggravated assault and misconduct involving a weapon. Shortly after his sentence was imposed, his son was born. He requested visitation, but DES declined to schedule visitation at the prison. With just a year left of his sentence, the juvenile court held a severance trial at which the father provided testimony. The court severed his parental rights finding that his sentence was of such a length that his child would be deprived of a normal home and that the nature of his convictions proved he was unfit and that severance was in the best interest of the child. Michael J. appealed.

The court of appeals reiterated that the standard to sever parental rights is clear and convincing evidence, *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) and a reversal of a juvenile court's ruling will occur only if the court's findings are clearly erroneous, *Maricopa County Juvenile Action No. JS-501568*, 177 Ariz. 571, 576, 869 P.2d 1224, 1229 (App.1994).

Prior severances based upon length of sentences have generally involved much greater sentences than outlined in this matter - *Pima County Juvenile Action No. S-1147*, 135 Ariz.184, 185, 659 P.2d 1329, 1330 (App. 1983) (sentenced to life imprisonment) and *Maricopa County Juvenile Action No. JS-7499*, 163 Ariz. 153, 155, 786 P.2d 1004, 1006 (App. 1989) (25 year sentence). The court of appeals took exception to the reasoning in *Maricopa County Juvenile Action No. JS-9104*, 183 Ariz. 455, 904 P.2d 1279 (App. 1995) in which severance was granted in a case where the father was sentenced to 5.25 years in prison. The court of appeals felt the reasoning in that case seemed to confuse length of sentence with best interest of child and adoption issues which should be heard in the domestic relations court, not the severance matter. Accordingly, the court of appeals in this matter held that there must be some showing beyond the mere fact of a prison sentence, that the sentence of such length that it will significantly and detrimentally impact the child's home life. That was not the case in this matter.

In addressing the issue of unfitness, the court of appeals noted that most severance for this reason involve crimes that are sex-related or a crime against the child or other family members. *JS-7499*, 163 Ariz. 153, 786 P.2d 1004 (the father had raped his daughter), *Pima County Juvenile Action No. S-949*, 134 Ariz. 442, 657 P.2d 430 (App. 1982) (father convicted of attempted sexual assault, sexual abuse, and attempted kidnapping of his 12-year-old sister-in-law), and *Pima County Juvenile Action No. S-983*, 133 Ariz. 182, 185, 650 P.2d 484, 487 (App.1982) (the father was serving a sentence for sexual assault and kidnapping). To sever for unfitness, the felony must directly demonstrate the individual's substantial unfitness to parent, as

opposed to the general character defects reflected by the commission of any felony. While Michael J.'s crimes indicated serious character flaws, they did not reflect a substantial unfitness to parent.

In reviewing the abandonment issue, the court of appeals agreed with DES that the new statutory definition of abandonment deleted the intent language. The court reasoned that while the language was deleted, the Arizona Supreme Court in *Pima County Juvenile Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994) described how conduct speaks better than intent. In this matter, Michael J. requested visitation with his son despite his incarceration and persevered in discovering his child's whereabouts in spite of the fact DES would not provide him that information. Michael J. did not abandon his child. The trial court's judgement was reversed.

James S. v. Arizona Department of Economic Security, 279 Ariz. Adv. Rep. 17 (1998) - Prison sentence length in severing rights.

The juvenile court severed the father's rights because he was sentenced to 5.5 years in prison six months after his daughter was born and it was in the best interest of the child. The father appealed.

The court of appeals reasoned that the father had virtually no time to bond with the child before his incarceration and that with more than three years to serve on his sentence, the child would be deprived of a normal home. The court of appeals went on to find support for the court's determination that it would be in the best interest of the child to sever the father's rights. The juvenile court's severance order was affirmed.

Maricopa County Juvenile Action No. JD*-6123*, 243 Ariz. Adv. Rep. 11 (1997) - The juvenile court is required to admit Department of Economic Security's written reports into evidence.

The juvenile's father appealed the court's finding that his daughter was dependent. He argued that the court allowed hearsay evidence contained in the C.P.S. caseworker's report to which he objected during the hearing. The court of appeals noted that Rule 16.1 of the Arizona Rules of Procedure for the Juvenile Court requires the court to admit the Department of Economic Security's written reports into evidence as long as the reports have been provided to all parties at least 30 days prior to the hearing and the caseworker who prepared the report is available to be cross-examined. Both were met in this case. The court of appeals affirmed the juvenile court's finding of dependency.

Worcester v. Worcester, 245 Ariz. Adv. Rep. 15 (1997)

The child's best interest takes precedence over the determination of paternity. The court should determine whether it serves the best interest of the child before entertaining evidence involving disputed paternity.

Maricopa County Juvenile Action No. JS-9104, 192 Ariz. Adv. Rep. 15 (1995) - Severance as a result of a prison sentence.

The 7-year-old juvenile lived with her father until his arrest for sale of cocaine. She then went to

live with her mother and stepfather. A year later, the father was convicted of the offense and sentenced to a flat term of 5.25 years imprisonment, to be released December, 1995. When the mother was given sole custody of the juvenile, the juvenile court indicated that the father could petition to gain visitation rights upon his release. At a subsequent severance hearing, the mother admitted that she had been a drug addict and prostitute as well as having mental health problems for some years. The father admitted he was also a drug addict. Three expert witnesses testified that it would be in the best interest of the juvenile to sever the father's ties and allow the stepfather to adopt the juvenile. The juvenile court granted the severance of the father's rights. The father appealed.

The court of appeals addressed the issue that the juvenile court erred by severing parental rights because the father was serving a prison sentence " . . . of such a length that the child will be deprived of a normal home for a period of years." A.R.S. § 8-533(B)(4). The court of appeals held:

> . . . A.R.S. § 8-533(B)(4) has been properly construed by the juvenile court given the facts presented in this particular case. Given the transitional age of the child at the time (from child to teenager); the evidence of a broken parent-child bond; the child's self-initiated desire to be adopted by her stepfather; the mental and emotional make-up of the child; and the stepfather's eagerness to adopt and parent the child during her most difficult years compels us to hold that the juvenile court did not abuse its discretion in granting severance in this case. Adoptability of the child is one factor in considering the child's best interests. *Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 884 P.2d 234 (App. 1994). We do not hold or believe that a natural parent's prison sentence of 5.25 years would necessarily mandate such a result in every case. We only hold that the result was correct given the totality of the evidence in this case.

Judge Noyes dissented, believing that there had been too much emphasis on adoption issues in this case.

Pima County Juvenile Dependency Action No. 118537, 197 Ariz. Adv. Rep. 69 (1995) - Acquittal of child molest charges does not necessarily warrant dismissal of severance.

The juveniles' father was charged with six counts of sexual abuse, two counts of sexual assault, one count of indecent exposure to a person fifteen or older, and one count of furnishing obscene items to a minor resulting from incidents with his niece. Subsequently, he was convicted of one count of indecent exposure and placed on probation. A condition of that probation allowed unsupervised contact with the juveniles but not others and required him to live outside the home. The state petitioned to declare the children dependent as to both parents. In its petition the state also alleged that a psychologist found the father posed a risk to the children, that he denied abusing his niece, and the mother maintained the father did not pose a risk to the children. After a four-day hearing, the juvenile court found the allegations to have been proven by a preponderance of the evidence and adjudicated the children dependent. The parents appealed.

The court of appeals rejected the father's argument that the sexual abuse of the niece could not be the basis of his children's dependency since he was acquitted of the sexual abuse charges. "That the father was acquitted of those charges only means that the state failed to establish the elements of the offenses beyond a reasonable doubt. Because the burden of proof in a dependency proceeding is only a preponderance of the evidence, the acquittal is of no consequence. The juvenile court found there was sufficient evidence under a lesser burden of proof to support a finding that the father had molested (his niece) . . ." With the additional evidence that the mother had told the juvenile not to say anything about the molestation because she

wanted to keep it in the family, the court of appeals upheld the juvenile court's dependency finding.

Pima County Juvenile Severance Action No. S-120171, 194 Ariz. Adv. Rep. 28 (1995) - Fetus not considered a child under severance statutes.

The Department of Economic Security (DES) sought to sever the parental rights of the mother because of ingestion of alcohol during pregnancy of her two children. It was undisputed that both children suffered from fetal alcohol syndrome. The court of appeals concurred with the juvenile court not to sever the mother's rights because a child under the severance statute does not include a fetus.

JV 502820 v. Superior Court in Maricopa County, 182 Ariz. Adv. Rep. 37 (1995) - Dependent children cannot be placed in detention.

The seventeen-year-old juvenile was made a ward of the court and committed to the care of the Arizona Department of Economic Security (DES) Child Protective Services (CPS). She was brought into the detention facility on a Saturday evening for disorderly conduct after CPS refused to take her. At Intake, her parents and CPS again refused to take her. She was put into detention. At the detention hearing on Sunday afternoon, the commissioner learned the state had filed no delinquency petition but CPS had asked the court not to release her to anyone except her caseworker on Monday morning. The juvenile objected to this request. The court ordered her to be detained until a responsible party from CPS came to pick her up. The court noted ". . . the sole reason for detention is the fact that there is no responsible party here from the State to take this ward." The juvenile was released to CPS Monday afternoon. A special action was filed.

Although the issue was moot for the petitioner, the court of appeals granted review because the issue was serious and capable of repetition and "review-avoidance." Relief was granted. "Simply stated, there is no provision in the Arizona statutes for the juvenile court to order that a dependent child be detained. Children who are allegedly delinquent or incorrigible may be detained in certain circumstances, but not other children." The court held ". . . children can be detained only if they are alleged to be delinquent or incorrigible and only in compliance with Rule 3, Rules of Procedure for Juvenile Court following appointment or waiver of counsel pursuant to A.R.S. § 8-225(C)."

Arizona Department of Economic Security (DES) v. Superior Court in Maricopa County, 178 Ariz. Adv. Rep. 10 (1994) - In severance actions, when any party properly objects to portions of a social study report, such portions of that report are not admissible into evidence.

In a contested severance proceeding, the mother properly filed objections to the completed social study. The trial court sustained the mother's objections and admitted a redacted report. It stated " . . . this court believes it would be manifestly unjust to allow the State to prove its case and terminate fundamental rights based upon a written report over timely, specific, and proper objections." DES filed a special action contending that *Maricopa County Juvenile Action No. JS-501904*, 169 Ariz. Adv. Rep. 34 (1994) held that a social study report " . . . as a whole is admissible, even over a given party's objections."

The court of appeals held that " . . . due process requires that when timely, specific, and proper objections are raised to specific portions of a social study report, the state must introduce other evidence to

prove its case as to those portions. The burden should not shift to the parents to disprove the report. . . . Thus, we believe *Maricopa County JS-501904* is consistent with A.R.S. § 8-537(B) and *J-75482*. Therefore, we hold that in severance actions, when any party timely, specifically and properly objects to portions of a social study report, such portions of that report are not admissible into evidence. The State must prove its case with other evidence."

S.S. v. Superior Court in Maricopa County, 161 Ariz. Adv. Rep. 42 (1994) - The juvenile court did not have to adhere to civil procedures to determine the extent of discovery.

Special action was brought to the court of appeals by the father of children alleged to be dependent. The juvenile judge denied the father's request that the Department of Economic Security (DES) comply with the extensive pretrial discovery requirements of Rule 26.1 of the Arizona Rules of Civil Procedure before proceeding to hearing. The court of appeals confirmed *Yavapai County Juvenile Action No. 7707*, 25 Ariz. App. 397 (1975), holding that juvenile proceedings are governed by the Rules of Procedure for Juvenile Court. It held that in instances where the juvenile rules are silent and the civil rules are readily adaptable, it may be appropriate to resort to the civil rules. Such was not the case in this matter. The court went on to state it did not hold that in every dependency case, discovery was limited to the DES report. Rather, it felt the juvenile court had the inherent power, on a case-by-case basis, to order such discovery as it deems necessary. Relief was denied.

Maricopa County Juvenile Action No. JS-501568, 160 Ariz. Adv. Rep. 21 (1994) - The trial court can terminate parental rights when a parent's drug addiction has caused removal of the child.

After the juvenile court terminated the mother's parental rights with respect to her daughter, the mother appealed the decision. The court of appeals held that Arizona law permitted the trial court to terminate parental rights when a parent's drug addiction has caused the initial removal of her child by the state and the parent substantially neglects to remedy her addiction for more than a year after the removal.

Maricopa County Juvenile Action No. JD-6236, 164 Ariz. Adv. Rep. 65 (1994) - Jurisdiction over all matters affecting dependent children rests solely with the juvenile court. Agencies such as DES and Foster Care Review Boards are special advocates that function to provide information to aid the court in making its decision regarding what is in the child's best interest, but do not determine it.

After the juvenile court found the four-year-old dependent and made her a ward of the court under the care of DES, DES recommended to the court that the child be transferred from her paternal grandmother to her maternal grandparents. After the father asked for a hearing in the matter, the court granted the transfer noting in the minute entry, "Were the Court the person the law charges with making the decision in the first instance, the Court might not be inclined to order transfer at the present time. The Court's view of its legal position in this matter is that it reviews the appropriateness of the actions of the Department of Economic Security. The Court does not find the Department has abused its discretion in recommending transfer at this time."

On appeal, the court of appeals noted that the Arizona Constitution places the jurisdiction over all matters affecting dependent children solely with the juvenile court. According to A.R.S. § 8-522, such agencies as DES and Foster Care Review Boards are special advocates that function to provide information to aid the court in making its decision regarding what is in the child's best interest. These agencies recommend what is in the child's best interest, but do not determine it. Accordingly, the court of appeals directed the juvenile court to independently determine the best interest of the child and the subsequent placement issue.

Maricopa County Juvenile Action No. JD-5312, 163 Ariz. Adv. Rep. 45 (1994) - Parents have the right to appeal from the termination of visitation order.

After the juvenile court terminated the mother's visitation rights with her three children, she appealed that decision. The court of appeals concluded that it must first decide if a termination of visitation order was a final appealable order since there had been no reported Arizona cases in which any party had attempted to appeal from a juvenile court's order terminating a parent's visitation right. The court went on to hold that since visitation is so critical to any effort of the parents to regain custody of their children, they must have the right to appeal from the termination of visitation order.

In this particular matter, the court of appeals held that the juvenile court properly found grounds to sever the mother's visitation rights since the supervised visitations adversely affected the children. The juvenile court's order of termination was affirmed.

Arizona Department of Economic Security (DES) v. Superior Court in Maricopa County, 162 Ariz. Adv. Rep. 6 (1994) - The juvenile court has the authority to order DES substituted as petitioner in a dependency action in which DES recommends that the court find the children to be dependent.

A private attorney was appointed by the juvenile court as *guardian ad litem* for one of the mother's two sons. This attorney subsequently found the mother had other children that were not receiving care by the mother and filed a petition for dependency for all four children. The children were ordered into the care of DES. At the dependency hearing the juvenile court asked why DES and the Attorney General's (A.G.) office had not been substituted for the private attorney. The assistant A.G. argued that the State of Arizona did not fall within Rule 25 of the Rules of Civil Procedure as appropriate party to substitute. The assistant A.G. did not feel it was the burden of DES to bring the matter to trial. The private attorney urged the court to substitute DES in his place because they had the resources. The court agreed and ordered DES substituted as the petitioner in the dependency action. This order required the A.G.'s office to be substituted for the private counsel as counsel for DES. DES filed a special action with the court of appeals arguing that none of the grounds for substitution outlined in Rule 25 were present and therefore, the court could not order the substitution of DES as petitioner in this case.

The court of appeals felt that Rule 17 was more relevant than Rule 25, but that the issue should not be decided solely by reference to the Arizona Rules of Civil Procedure. Although dependency hearings are to be conducted in a manner similar to the trial of a civil action before the court sitting without a jury, " . . . the juvenile justice system is unique, having its own purpose and procedure," *Maricopa County Juvenile Action No. J-81405-S*.

The court of appeals noted that although DES expressed and gave cooperation in this matter, it was asking the court " . . . for a ruling that would give DES the power to, in effect, force the juvenile court to pay

private attorneys with county funds to provide legal services for children that the state is responsible for providing with its own attorneys. The agency cannot so delegate its responsibilities regarding dependent children. We hold that the juvenile court has the authority to order DES substituted as petitioner in a dependency action in which DES recommends that the court find the children to be dependent." The juvenile court's order substituting DES was upheld.

Pima County Juvenile Severance Action No. S-114487, 168 Ariz. Adv. Rep. 4 (1994) - Abandonment defined.

This case initially was reviewed by the Arizona Supreme Court after the trial court and court of appeals agreed that the "settled purpose test" was the proper standard to apply in all abandonment cases rather than the statutory definition of abandonment found in A.R.S. § 8-546. The Arizona Supreme Court granted review and held that both courts had relied upon the wrong standard of abandonment and remanded the case. The trial court subsequently found that the father's conduct constituted statutory abandonment. The father filed a special action with the Arizona Supreme Court on a number of issues.

The Arizona Supreme Court concluded that the trial court did not exceed her jurisdiction, abuse her discretion, or err in the procedure adopted during the second hearing. The evidence supported the trial court's findings that the father abandoned the child, as that term is legally defined, and that grounds for termination of parental rights existed. The trial court's actions were affirmed. The Arizona Supreme Court held that they " . . . have adopted a rule (of abandonment) that preserves parental interests when the parent grasps the opportunity quickly, diligently, and persistently. When the parent fails to do so, even though the failure may be understandable, the trial court may find abandonment and terminate parental rights if that is in the child's best interest."

Maricopa County Juvenile Action No. JS-8490, 168 Ariz. Adv. Rep. 16 (1994)

In a matter similar to *Pima County Juvenile Severance Action No. S-114487*, the Arizona Supreme Court affirmed the trial court's application of the statutory definition of abandonment in A.R.S. § 8-546.

Pima County Juvenile Severance Action S-114487, 144 Ariz. Adv. Rep. 48 (1993) - the "settled purpose" definition of abandonment should be used. The best interest of the child may not be used alone as a grounds for severance.

The child appealed the juvenile court's order denying the petition to terminate the father's parental rights based upon abandonment. The child was born to unwed teenage parents. The mother was sent to live with an aunt in Arizona until the child was born. She subsequently relinquished her parental rights and the child was placed with adoptive parents. A severance petition was filed for termination of the father's rights alleging abandonment. The juvenile court found that there was not clear and convincing evidence to support termination. The juvenile court found that to show abandonment the parent must have " . . . a settled purpose to forego all parental duties and relinquish all parental claim to the child". *JS-500274*, 804 P.2d 730 (1990). Instead, the juvenile court found that prior to the child's birth, the father had become engaged to the mother and

had planned to marry her when she returned from Arizona with the child. The father had also saved money for baby supplies. When the mother returned, she told him there was nothing he could do about the baby being placed for adoption. He wrote to the court to contest the severance. The juvenile court denied the severance but found removal of the child from her current placement would not be in her best interest and granted legal custody to Child Protective Services. The child and the County Attorney's Division of Child Advocacy appealed, arguing that the definition of abandonment found in A.R.S. § 8-546 (A)(1) should have been used rather than "settled purpose."

The court of appeals confirmed the juvenile court's action. It recognized the "settled purpose" definition of abandonment and noted the Arizona Supreme Court had declared that the best interest of the child may not be used alone as a grounds for severance.

Maricopa Juvenile Action, JS-8441, 144 Ariz. Adv. Rep. 61 (1993)

The father of a dependant child appealed the juvenile court's order to terminate his parental rights after a two year out-of-home placement. He contended that because his caseworker did not like him that the Department of Economic Security (DES) had not diligently provided him with remedial services to care for his two-year-old who suffered from fetal alcohol syndrome. He also felt it was in the best interest of the child to return her to him despite the fact that he acknowledged living in a ghetto, moving twelve times in two years, being sporadically employed and being prone to relapse in his use of alcohol. The court of appeals affirmed the juvenile court's order to terminate the father's parental rights.

DNA Testing

In re Sean M., 248 Ariz. Adv. Rep. 38 (1997) - A.R.S. § 13-3821 (C) does apply to juveniles. Attempted sex offenses do require DNA testing.

The juvenile was adjudicated delinquent of attempted child molestation and placed on probation. As a condition of probation, the court ordered the juvenile to register as a sex offender and undergo DNA testing. The juvenile appealed these conditions. He argued the court erred when it ordered his registration as a sex offender for the purpose of notifying the public as outlined in A.R.S. § 13-3825 (C). He subsequently argued that DNA testing was not required for "attempted" sex offenses.

As to the first argument, the court of appeals noted that the juvenile judge imposed the sex registration under A.R.S. § 13-3821 (C), which in fact does apply to juveniles. As to the second argument that attempted sex offenses do not elicit DNA testing, the juvenile court likened it to the rejected argument in *State v. Lammie*, 164 Ariz. 377, 793 P.2d 134 (App. 1990). That case argued that attempted sex offenders did not have to register as sex offenders. It was rejected. The conditions of probation were affirmed.

Maricopa County Juvenile Action Nos. JV-512600 and JV-512797, 221 Ariz. Adv. Rep. 38 (1996)

In these consolidated matters, both juveniles admitted to counts of child molestation and were ordered to submit to DNA testing as part of their probation conditions. They appealed this condition on a number of issues.

In addressing the first issue, whether A.R.S. §§ 13-4438 and 31-281 could be imposed retroactively pursuant to A.R.S. § 1-244, the court of appeals dismissed the juveniles' argument because they found these statutes not to be punitive in nature and could be imposed retroactively. The court of appeals similarly dismissed the juveniles' second issue, that DNA testing was an unreasonable search and invaded their privacy.

> . . . the expectation of privacy is significantly diminished when one considers that the individual asserting the claim has been adjudicated delinquent for committing a sexual offense. The public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit sex offenses rightfully outweighs the intrusion on the delinquent juvenile's privacy.

The third issue the juveniles raised on appeal involved the use of the DNA results beyond their eighteenth birthday, after the juvenile court lost jurisdiction. The court of appeals held that Arizona's Constitution and the legislature's intent permitted the results to be used after they left the jurisdiction of the juvenile court. Lastly, the court of appeals held that DNA testing did not violate the declared mission of the juvenile court: rehabilitation and treatment.

Maricopa County Juvenile Action No. JV-508801, 187 Ariz. Adv. Rep. 26 (1995)

In response to three cases that involved juveniles having to submit blood samples to the Arizona DNA Identification System as a condition of probation, the court of appeals consolidated these matters into one

decision. In each of these cases, the juvenile was adjudicated delinquent based upon allegations that he had molested another child. In none of the cases was the victim exposed to the juvenile's blood or bodily fluids. In each instance, the state had requested and the juvenile court ordered the juvenile to submit a blood sample for DNA registration as a condition of probation. In one instance, the court had noted the DNA prints would be destroyed or sealed upon the juvenile's 18th birthday.

The court of appeals, in a split decision, ruled the juvenile courts could not order DNA testing for juveniles. The court noted that the Arizona DNA Identification System was enacted through A.R.S. § 41-2418(A) and the offenders required to submit to DNA testing were outlined in A.R.S. § 13-4438. This latter statute identifies offenders convicted of sexual offenses as those who must be DNA tested. Since A.R.S. § 8-207(A) specifies that juvenile delinquents are not convicted of offenses, the court of appeals reasoned they could not be required to complete DNA testing. The court was careful to note that the juvenile courts have wide discretion in imposing conditions of probation, but in this case, the addition of DNA testing was an expansion of the criminal code. "Defining crimes and fixing penalties are legislative, not judicial functions." *State v. Wagstaff*, 164 Ariz. 485 (1990).

Judge Lankford dissented. He felt the outlined statutes did not preclude the juvenile court from requiring DNA testing as a condition of probation. "The fact that the legislature has not required testing does not mean that testing is prohibited. It is one thing to require a test; it is another to forbid the test. The legislature has not forbidden DNA testing of juveniles. On the contrary, the legislature has accorded the superior court broad powers regarding the disposition and treatment of juveniles." Citing A.R.S. § 8-241(A)(2)(b) in which the juvenile court may award a delinquent child " . . . to a probation department, subject to such conditions as the court may impose," Judge Lankford reasoned the court may impose appropriate conditions without expanding the criminal code. Emphasizing the court's broad discretion, Judge Lankford cited *Maricopa County Juvenile Action No. JV-128676*, 177 Ariz. 352 (1994) in which the court of appeals held " . . . (a) condition of probation which does not violate basic fundamental fights and bears a relationship to the purpose of probation will not be disturbed on appeal."

HIV Testing

Maricopa County Juvenile Action No. JV-511237, 221 Ariz. Adv. Rep. 42 (1996)- HIV testing is an appropriate condition only if requested by the victim.

The fourteen-year-old juvenile was granted probation after being adjudicated delinquent for rubbing his five-year-old brother's penis while they watched an x-rated video. As special conditions of probation, the juvenile was ordered to: submit to HIV testing, not possess any sexually stimulating material or patronize any place where such material is available, and wear undergarments and clothing in situations where another person may see him. The juvenile appealed these conditions.

Although the court of appeals confirmed that the juvenile court had a right to impose the HIV testing because the juvenile had admitted to other acts that would have exposed the victim to his bodily fluids, it denied the imposition of this condition because A.R.S. § 8-241(N) specifically allows HIV testing *only on the request of the victim.* The victim did not request such testing in this matter.

The court of appeals next held that the "patronizing" condition was too broad and vague. It precluded the juvenile from visiting convenience markets where *Playboy* might be sold. The court of appeals upheld the condition regarding the juvenile's clothing. It held that this condition merely required the juvenile to be properly clothed in the presence of others. The conditions involving HIV testing and patronizing were vacated.

State v. Superior Court in Maricopa County (JV511263), 221 Ariz. Adv. Rep. 30 (1996) - HIV testing determined to be constitutional.

The juvenile in this matter was adjudicated delinquent for child molestation after attempting anal intercourse with the victim. The victim's mother requested HIV-testing as provided in A.R.S. § 8-241 (N). The juvenile court denied this request finding involuntary HIV-testing to be an unreasonable search under the Fourth Amendment. The state filed a special action.

The court of appeals held

> . . . on the facts presented in this case, we find that the juvenile offender's privacy interest in resisting HIV testing is substantially outweighed by the government's interest in assisting victims of sexual offenses to discover whether they have been exposed to HIV. We further conclude that A.R.S. § 8-241(N) bears an adequately close and substantial relationship to the goal of helping victims to warrant deference from the courts.

The court of appeals went on to hold that the statute was not overly broad and did not violate A.R.S. § 36-665(A). The order finding the statute unconstitutional was vacated and the case remanded for further proceedings consistent with this decision.

Juvenile Intensive Probation Supervision

In re J.G., 291 Ariz. Adv. Rep. 43 (1999) - Court can modify probation to include JIPS, provided juvenile was given notice and due process.

The juvenile was placed on probation and also placed in a residential drug treatment program. Following his release from the program, the court placed him on Juvenile Intensive Probation Supervision (JIPS). The juvenile objected, contending the court could not place him on JIPS unless he had violated the conditions of his probation and that he had not been given notice that the court would consider JIPS. When the juvenile court dismissed this objection, the juvenile appealed.

The court of appeals disagreed with the juvenile. In exercising its discretion, the juvenile court may modify the conditions of a juvenile probation consistent with due process. *Pinal County Juv. Action No. J-169*, 131 Ariz. 187, 189, 639 P.2d 377, 379 (App. 1981). Due process requires notice of a hearing. *In re Marie G.*, 189 Ariz. 632, 633, 944 P.2d 1246, 1246 (App. 1997).

Here, the juvenile was given notice of the hearing. That he had no notice that the court would place him on JIPS was not persuasive since the court has broad discretion in determining the appropriate disposition for delinquent juveniles. *Maricopa County Juv. Acton No. JV-5120312*, 183 Ariz. 116, 118, 901 P.2d 464, 466 (App. 1995)

The court of appeals went on to review the JIPS statutes and guidelines and found the court's placement of the juvenile consistent with them. However, the court of appeals noted the trial court erred by failing to specify its reasons for imposing JIPS. Since the record supported the court's disposition, the court of appeals affirmed the juvenile court's order modifying the conditions of probation.

In re Jerry B., 283 Ariz. Adv. Rep. 19 (1998) - Juvenile can be designated a repeat offender when first offense occurred prior to effective date of A.R.S. § 8-241.

The juvenile was placed on probation in January 1998 as a first time felony offender. At that time, he was given notice that he could be designated a repeat felony offender and placed on JIPS if he committed another felony offense in accordance with A.R.S. § 8-241 which became effective on July 21, 1997. The juvenile committed another offense a month later and was placed on JIPS. He appealed, arguing that since his first offense was committed before the effective date of A.R.S. § 8-241, it was an unconstitutional *ex post facto* sentence.

The court of appeals noted that this issue was resolved in *In re Shane B.*, 276 Ariz. Adv. Rep. 11 (App. Aug. 20, 1998) which held that is not unconstitutional since the statute's impact was predominantly regulatory, not punitive. Similarly, his increased punishment was not *ex post facto* violation either, since his second offense occurred after the statute had taken effect. The disposition was affirmed.

Navajo County Juvenile Action No. 92-J-040, 179 Ariz. Adv. Rep. 13 (1994)

The juvenile was placed on Juvenile Intensive Probation Supervision (JIPS) after being found in violation of the conditions of his standard probation. As a condition of JIPS, the court ordered the juvenile to spend an additional 30 days in detention at the discretion of the probation officer. The court explained to the juvenile that if he obeyed the conditions, the probation officer would not order him to serve the additional time. If the juvenile did not obey them or did not have the proper attitude, the 30 days could be ordered at any time. The juvenile appealed this condition.

The court of appeals noted that although A.R.S. § § 8-271 to -278 do not expressly authorize the juvenile court to order detention as a condition of JIPS, it may do so. The court of appeals relied upon *Pima County Juvenile Action No. J-20705-3* in which the court imposed detention as a condition of standard probation even though A.R.S. § 8-241 did not specifically authorize it. The court reasoned that ordering detention may bear a reasonable relationship to possible rehabilitation of the juvenile.

However, the court of appeals held the juvenile court erred in granting the probation officer discretion to impose this condition. The power to impose or modify conditions of probation lies solely with the court. It may not be delegated to a probation officer. That part of the juvenile court's order was vacated.

Miranda Rights

Navajo County Juvenile Action No. JV91000058, 198 Ariz. Adv. Rep. 19 (1995) - Non-law enforcement agents do not have to administer *Miranda* rights.

The defendant admitted to the school principal that he had started a fire in another student's locker. When the police arrived, the principal had the juvenile repeat his admission. The juvenile court found the statements admissible and placed the juvenile on probation. The juvenile appealed contending he had not been given his *Miranda* rights by the principal and the admission was involuntary.

The court of appeals noted that law enforcement agents whose primary mission is to enforce the law are required to give *Miranda* warnings. The principal was not a law enforcement agent nor was he acting " . . . as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile." *Massachusetts v. Snyder*, 597 N.E.2d 1363 (1992). Similarly, the court of appeals did not find the admission had been coerced. The judgment was affirmed.

Maricopa County Juvenile Action No. JV-501010, 139 Ariz. Adv. Rep. 37 (1993)

A police officer, investigating the theft of motorcycles, was informed by the juvenile's neighbor that the juvenile had said he was going to steal them. While interviewing the juvenile at his home in the presence of his mother, the officer told the juvenile that the others involved had already told him about it and he wanted to get the juvenile's version. The juvenile and his mother contended that the officer stated that he knew about it already and the juvenile could tell his side there or down at the jail. The juvenile agreed and showed the officer where the motorcycles were. The juvenile subsequently appealed contending his statements to the officer should have been suppressed.

The court of appeals held that because the juvenile was not in custody at the time of questioning, *Miranda* rights were not required *State v. Berlet.* 136 Ariz. 488 (1983) However, the court of appeals was less certain that the statements were made voluntarily. There seemed to have been some threat of incarceration. Consequently, the case was remanded to determine if, in fact, the officer had threatened incarceration, in which case the statements would not have been voluntary.

Pima County Juvenile Delinquency No. 97036-02, 792 P.2d 769 (1990)

Voluntariness of juvenile's statement is judged according to totality of circumstances. Under the totality of circumstances, a minor's statements following a police officer's misrepresentations and promises were not voluntarily given and should have been suppressed; fairly construed, the officer's statements not only misrepresented to juvenile his rights in juvenile proceeding but also conveyed to him that if he gave answers satisfactory to them, they would help him and he would not face charges.

In determining whether an error in admitting the minor's statements requires reversal, the test in context of a jury trial is whether, absent error, it is clear beyond a reasonable doubt that jury would have returned a verdict of guilty; in a trial to bench, however, the rule has been stated that the court of appeals will assume, unless it affirmatively appears to contrary, that trial judge only considered competent evidence in arriving at final judgment.

Parental Liability

Broadbent v. Broadbent, 203 Ariz. Adv. Rep. 19 (1995)

Mrs. Broadbent left her 2½-year-old son beside the swimming pool when she went to answer the telephone. He fell in the pool and drowned. The Arizona Supreme Court ruled that "Mrs. Broadbent is not immune from liability in this case because of the doctrine of parental immunity, which we hereby abolish."

Probation Conditions

In re Richard M., 299 Ariz. Adv. Rep. 57 (1999) - Conditions and directives must be in writing to meet the standards for a violation. A court cannot order a juvenile into detention without a petition to revoke probation or without a hearing because to do so would violate the juvenile's right to due process.

The juvenile was placed on Juvenile Intensive Probation Supervision (JIPS). As a condition of reinstatement to JIPS some months later, the juvenile was ordered to submit to drug testing as directed by the probation officer. Six months later, the probation officer filed a petition to revoke probation alleging the juvenile had failed to submit to testing at the Treatment Assessment Screening Center (TASC). The court continued Richard on JIPS and affirmed all previous conditions of probation and added that the juvenile was to serve weekend detention if he missed a schedule drug testing appointment or tested positive. Richard appealed arguing two points:

1) Whether the court could find him in violation of the drug testing condition since he was advised of the time and place of testing orally by the probation officer, not in writing; and
2) Whether he could be placed in detention without a hearing.

The court of appeals, with Judge Ehrlich dissenting, concurred that Richard could only be found in violation if ". . . the probation officer had first provided Richard with written notice of where and when he was to appear for drug testing." Reviewing *State v. Watkins*, 125 Ariz. 570, 572, 611 P.2d 923, 925 (1980), the court of appeals noted that probation conditions must be provided to the probationer in writing. And, as in *State v. Jones*, 163 Ariz. 498, 499, 788 P.2d 1249, 1250 (App. 1990) and *State v. Robinson*, 177 Ariz. 543, 544, 869 P.2d 1249, 1250 (App. 1990), a probationer cannot be found in violation of the conditions of his probation if the conditions and modifications or clarifications are not in provided in writing. Citing from *Robinson*, the court of appeals reiterated that "if an order is important enough to warrant a revocation petition, the order first must be reduced to writing and given to probationer." 177 Ariz. At 546, 869 P.2d at 1199.

In reviewing the order requiring detention without a hearing, the court of appeals confirmed that "a court cannot order a juvenile into detention without a petition to revoke probation or without a hearing because to do so would violate the juvenile's right to due process. See *In re Marie G.*, 189 Ariz. 632, 634, 944 P.2d 1246, 1248 (App. 1997)."

The violation was reversed and the matter remanded.

Judge Ehrlich dissented the court of appeal's finding concerning the probation violation. She felt Richard had been given sufficient clarification on the condition of probation and did not feel the court should be burdened with ministerial activities such as committing everything to writing.

In re Henry B., 272 Ariz. Adv. Rep. 6 (1998) - The court cannot delegated to probation officer explaining why certain conditions of probation were imposed.

At the juvenile's hearing, the judge neglected to ask the juvenile prior to his plea if he had been made any promises if he entered a plea. The first of his issues on appeal was that the his admission was involuntary because of this error. The court of appeals noted that the juvenile had been asked if he was being forced or threatened to make the plea. He also provided a factual basis for the plea and stated he understood the rights he was waiving by pleading. The court of appeals held that there was sufficient reason to believe the plea was voluntary and that the failure to ask about promises did not render it involuntary.

His second argument on appeal was that the court delegated its dispositional authority to the absent probation officer. When the defense objected to certain conditions of probation, the court advised the attorney to talk with the probation officer and the court would acquiesce if the probation officer changed his mind on the conditions. The court of appeals noted that

> while probation officers are certainly important and often reliable sources of information, a court that simply rubber-stamps their recommendations without exercising any reflective discretion of its own abdicates it responsibility and becomes a superfluous adjunct to the processing of cases by probation officers. We cannot condone this delegation of all reflection and decision-making to the probation officer. . . See *Depasquale v. Superior Court*, 181 Ariz. 333, 335-336, 890 P.2d 628, 630-31 (1995) (In awarding custody, the court must weigh the evidence and exercise independent judgement; it cannot allow a psychologist to decide what is in the child's best interest.). See also *State v. Turnbull*, 114 Ariz. 289, 291, 560 P.2d 807, 809 (1977) (need for an "independent decision maker . . . other than the correctional officer.")
>
> The disposition was vacated.

In re Marie G., 251 Ariz. Adv. Rep. 15 (1997) - The juvenile court can impose a period of weekend jail, and for each week that the juvenile was negative for drugs, a weekend would be waived.

As a condition of probation, the judge ordered as one condition of probation that the juvenile be complete 10 weekends of detention. For each week that the juvenile tested negative for any drug, the court would, without a hearing waive a weekend's detention. The probation officer was to report the results of testing each week to the judge. The juvenile appealed this condition, arguing that she would have to serve detention without a hearing and that the court was relegating its responsibilities to the probation officer in contradiction of *Pinal County Juvenile Action No. J-169*, 131 Ariz. 187 (App. 1981) and *Navajo County Juvenile Action No. 92-J-040*, 180 Ariz. 562 (App. 1994) respectively.

The court of appeals did not accept the juvenile's arguments. In regards to the argument that the court had surrendered its authority to the probation officer, the officer did not determine if the juvenile was to be detained. The judge would determine that based upon the officer's report. As to the being detained without a hearing, the juvenile would not be jeopardized if detention was waived without a hearing. However, if the juvenile tested positive for drugs, the court of appeals indicated the judge would have to give the juvenile notice and an opportunity to contest it. The adjudication and order were affirmed.

In re John G., 261 Ariz. Adv. Rep. 39 (1998) - The juvenile court is not precluded from imposing fingerprinting as a condition of probation

The juvenile was placed on probation for a misdemeanor offense. As a condition of that probation, the court ordered the juvenile to be fingerprinted. The juvenile appealed, arguing A.R.S. § 8-241(T) applies to only those committed to Arizona Department of Juvenile Corrections or those adjudicated delinquent of a felony.

The court of appeals held that A.R.S. § 8-241(T) does not preclude the juvenile court from imposing fingerprinting as a condition of probation for those adjudicated of a misdemeanor, only that such cannot be sent to AFIS as discussed in *Abraham F., In re*, 255 Ariz. Adv. Rep. 38 (1997).

In re Abraham F., 255 Ariz. Adv. Rep. 38 (1997) - The juvenile court can order the juvenile to be fingerprinted, but the court cannot order these to be included in the AFIS. Juveniles adjudicated for misdemeanor offenses cannot have their fingerprints included in the AFIS

The court adjudicated the juvenile delinquent after he admitted to a charge of criminal damage, a misdemeanor charge. As a condition of the juvenile's probation, the court ordered his fingerprints be entered into the Arizona Department of Public Safety's automated fingerprint identification system (AFIS) based upon A.R.S. § 8-241.O (Supp.1996). The court reasoned that while this statute did not require those juveniles convicted of a misdemeanor to submit their fingerprints, the statute did not prevent the court from ordering it. The juvenile appealed.

The court of appeals concurred that the juvenile court could order the juvenile to be fingerprinted, but disagreed that the court could order these to be included in the AFIS. Reviewing the legislation, the court learned that the original bill contained a provision for misdemeanor convictions to be included in AFIS, as well as felonies. That particular section was not included in the final approved version of the legislation. Consequently, the court of appeals held that juveniles adjudicated for misdemeanor offenses cannot have their fingerprints included in the AFIS.

Maricopa County Juvenile Action No. JV-511237, 221 Ariz. Adv. Rep. 42 (1996) - HIV testing is an appropriate condition only if requested by the victim.

The fourteen-year-old juvenile was granted probation after being adjudicated delinquent for rubbing his five-year-old brother's penis while they watched an x-rated video. As special conditions of probation, the juvenile was ordered to: submit to HIV testing, not possess any sexually stimulating material or patronize any place where such material is available, and wear undergarments and clothing in situations where another person may see him. The juvenile appealed these conditions.

Although the court of appeals confirmed that the juvenile court had a right to impose the HIV testing because the juvenile had admitted to other acts that would have exposed the victim to his bodily fluids, it denied the imposition of this condition because A.R.S. § 8-241(N) specifically allows HIV testing *only on the request of the victim.* The victim did not request such testing in this matter.

The court of appeals next held that the "patronizing" condition was too broad and vague. It precluded the juvenile from visiting convenience markets where *Playboy* might be sold. The court of appeals upheld the condition regarding the juvenile's clothing. It held that this condition merely required the juvenile to be properly clothed in the presence of others. The conditions involving HIV testing and patronizing were vacated.

Maricopa County Juvenile Action No. JV-508488, 214 Ariz. Adv. Rep. 70 (1996) - Written notice of the term of probation is necessary before its violation can support the juvenile's probation revocation.

The 12-year-old juvenile was placed on probation and ordered as one of the conditions of probation to "attend school as required by law." At a subsequent violation hearing, the probation officer indicated that she wanted the juvenile to attend Valley Vocational Evening Support Program (VVESP) for six months. The court agreed and reinstated the juvenile to probation with the general condition that the juvenile "attend school as required by law." The juvenile was brought back before the court after failing to attend VVESP during the summer. The defense contended that no specific condition of probation existed ordering the juvenile to

VVESP, only attend school as required by law. Since the law did not require school attendance during the summer, the juvenile had committed no violation of his stated conditions. The court did not accept this argument and found the juvenile in violation. He was continued on probation. The juvenile appealed.

The court of appeals agreed with the juvenile that his failure to attend VVESP was not a violation because there was no written condition of probation to this effect. The second issue raised in this case was whether the juvenile violated his probation by failing to follow the oral directive of the probation officer. "We conclude that probation revocation is an area of juvenile law in which the adult criminal requirement regarding written notice of the terms of probation upon which revocation is based is appropriately applied as a principle of due process and general fairness. . . . We further conclude that written notice of this term of probation was necessary before its violation could support the juvenile's probation revocation." The juvenile court's revocation order was vacated, and the matter remanded.

Navajo County Juvenile Action No. 92-J-040, 179 Ariz. Adv. Rep. 13 (1994)

The juvenile was placed on Juvenile Intensive Probation Supervision (JIPS) after being found in violation of the conditions of his standard probation. As a condition of JIPS, the court ordered the juvenile to spend an additional 30 days in detention at the discretion of the probation officer. The court explained to the juvenile that if he obeyed the conditions, the probation officer would not order him to serve the additional time. If the juvenile did not obey them or did not have the proper attitude, the 30 days could be ordered at any time. The juvenile appealed this condition.

The court of appeals noted that although A.R.S. § § 8-271 to -278 do not expressly authorize the juvenile court to order detention as a condition of JIPS, it may do so. The court of appeals relied upon *Pima County Juvenile Action No. J-20705-3* in which the court imposed detention as a condition of standard probation even though A.R.S. § 8-241 did not specifically authorize it. The court reasoned that ordering detention may bear a reasonable relationship to possible rehabilitation of the juvenile.

However, the court of appeals held the juvenile court erred in granting the probation officer discretion to impose this condition. The power to impose or modify conditions of probation lies solely with the court. It may not be delegated to a probation officer. That part of the juvenile court's order was vacated.

Probation Modification

In re J.G., 291 Ariz. Adv. Rep. 43 (1999) - Court can modify probation to include JIPS, provided juvenile was given notice and due process.

The juvenile was placed on probation and also placed in a residential drug treatment program. Following his release from the program, the court placed him on Juvenile Intensive Probation Supervision (JIPS). The juvenile objected, contending the court could not place him on JIPS unless he had violated the conditions of his probation and that he had not been given notice that the court would consider JIPS. When the juvenile court dismissed this objection, the juvenile appealed.

The court of appeals disagreed with the juvenile. In exercising its discretion, the juvenile court may modify the conditions of a juvenile probation consistent with due process. *Pinal County Juv. Action No. J-169*, 131 Ariz. 187, 189, 639 P.2d 377, 379 (App. 1981). Due process requires notice of a hearing. *In re Marie G.*, 189 Ariz. 632, 633, 944 P.2d 1246, 1246 (App. 1997).

Here, the juvenile was given notice of the hearing. That he had no notice that the court would place him on JIPS was not persuasive since the court has broad discretion in determining the appropriate disposition for delinquent juveniles. *Maricopa County Juv. Acton No. JV-5120312*, 183 Ariz. 116, 118, 901 P.2d 464, 466 (App. 1995)

The court of appeals went on to review the JIPS statutes and guidelines and found the court's placement of the juvenile consistent with them. However, the court of appeals noted the trial court erred by failing to specify its reasons for imposing JIPS. Since the record supported the court's disposition, the court of appeals affirmed the juvenile court's order modifying the conditions of probation.

Probation Violation

In re Jonah T., 304 Ariz. Adv. Rep. 26 (1999) - There is no authority that allows an administrative order to govern, or conflict with, the rule of admissibility of otherwise reliable evidence or limit the statutory discretion afforded the juvenile court in dispositional alternatives in a juvenile probation revocation proceeding. Standards for drug testing evidence are not governed by Administrative Order No. 95-20.

In this matter, the court of appeals consolidated two juvenile appeals to address a common issue: were the results of the drug testing invalid because the testing standards did not comply with the Arizona Supreme Court's *Administrative Requirements for Adults and Juvenile Probation and Pre-Trial Services Drug Testing*, Administrative Order No. 95-20, effective March 16, 1995?

In *Jacob W.* and *Jonah T.*, the probation department petitioned to revoke the juveniles' probations when immunoassay drug testing revealed the presence of marijuana in their urine samples. In neither case did the drug laboratory conduct a confirmatory GC/MS test or the probation department request one as required by Administrative Order 95-20. Both juveniles denied the violations. Both were found to have violated their probations by using marijuana. Jacob W. was ordered to be detained for 30 days with an additional two months weekend incarceration. Jonah T. was reinstated to probation. In both cases, the defense appealed arguing against the admissibility of the evidence since it did not comply with the administrative order. Jacob W. also appealed the imposition of the detention.

Administrative Order 95-20 requires that if an offender denies the results of a drug testing completed by preliminary screening using the immunoassay method and the tests results are to be used in court, that sample must be retested using the more stringent Gas Chromatography/Mass Spectrometry (GC/MS) method. In neither of these cases was that additional test completed.

The defense argued that noncompliance with this administrative order was similar to noncompliance with the Department of Health Services(DHS) standards in DUI cases. In DUI cases which do not conform to DHS standards, the evidence has been determined to be unreliable and therefore, inadmissible.

The court of appeals did not find these two situations to be analogous. In the DUI cases, statutes require compliance with DHS standards. In contrast, legislation was never adopted to govern or limit the use of immunoassay testing in probation revocation matters. The court of appeals held that the administrative order did not rise to the level of statutory regulations.

> This administrative order, obviously well-researched and laudable in purpose, was intended to direct the appropriate court administrative personnel to establish uniform testing procedures. It did not, however, constitute a 'rule of court,' which would prescribe a procedural course of conduct that could deprive the parties of substantive rights for noncompliance. *See Espinoza v. Martin*, 182 Ariz. At 149, 894 P.2d at 692. Before they could be applied to suppress evidence or restrict dispositional alternatives, the policies and procedures set forth in Administrative Order 95-20 would have to be adopted as a court rule by the Arizona Supreme Court under its rule-making authority. In summary, we find no authority that would allow an administrative order to govern, or conflict with, the rule of admissibility of otherwise reliable evidence or limit the statutory discretion afforded the juvenile court in dispositional alternatives in a juvenile probation revocation proceeding. The policies and procedures adopted by Administrative Order 95-20 were directed at administrative court personnel, with enforcement placed in the

> hands of court administrators, not trial judges. We find no constitutional or statutory basis to construe Administrative Order 95-20 as affecting a substantiative change in the law. We therefore conclude that Administrative Order 95-20 did not preclude the admission of the immunoassay urine tests in these cases, nor did it limit the juvenile court's dispositional alternatives, even in the absence of a confirmatory GC/MS test.

In re Richard M., 299 Ariz. Adv. Rep. 57 (1999) - Probation officers must provide the juvenile written notice of directives. A condition of probation ordering weekend detention if the juvenile missed any drug testing cannot be imposed without a hearing to determine that the juvenile had violated the conditions of probation.

The juvenile was placed on Juvenile Intensive Probation Supervision (JIPS). As a condition of reinstatement to JIPS some months later, the juvenile was ordered to submit to drug testing as directed by the probation officer. Six months later, the probation officer filed a petition to revoke probation alleging the juvenile had failed to submit to testing at the Treatment Assessment Screening Center (TASC). The court continued Richard on JIPS and affirmed all previous conditions of probation and added that the juvenile was to serve weekend detention if he missed a schedule drug testing appointment or tested positive. Richard appealed arguing two points:

3) Whether the court could find him in violation of the drug testing condition since he was advised of the time and place of testing orally by the probation officer, not in writing; and

4) Whether he could be placed in detention without a hearing.

The court of appeals, with Judge Ehrlich dissenting, concurred that Richard could only be found in violation if ". . . the probation officer had first provided Richard with written notice of where and when he was to appear for drug testing." Reviewing *State v. Watkins*, 125 Ariz. 570, 572, 611 P.2d 923, 925 (1980), the court of appeals noted that probation conditions must be provided to the probationer in writing. And, as in *State v. Jones*, 163 Ariz. 498, 499, 788 P.2d 1249, 1250 (App. 1990) and *State v. Robinson*, 177 Ariz. 543, 544, 869 P.2d 1249, 1250 (App. 1990), a probationer cannot be found in violation of the conditions of his probation if the conditions and modifications or clarifications are not in provided in writing. Citing from *Robinson*, the court of appeals reiterated that "if an order is important enough to warrant a revocation petition, the order first must be reduced to writing and given to probationer." 177 Ariz. At 546, 869 P.2d at 1199.

In reviewing the order requiring detention without a hearing, the court of appeals confirmed that "a court cannot order a juvenile into detention without a petition to revoke probation or without a hearing because to do so would violate the juvenile's right to due process. See *In re Marie G.*, 189 Ariz. 632, 634, 944 P.2d 1246, 1248 (App. 1997)."

The violation was reversed and the matter remanded.

Judge Ehrlich dissented the court of appeal's finding concerning the probation violation. She felt Richard had been given sufficient clarification on the condition of probation and did not feel the court should be burdened with ministerial activities such as committing everything to writing.

Maricopa County Juvenile Action No. JV-508488, 214 Ariz. Adv. Rep. 70 (1996) - Written notice of the term of probation is necessary before its violation can support the juvenile's probation revocation.

The 12-year-old juvenile was placed on probation and ordered as one of the conditions of probation to "attend school as required by law." At a subsequent violation hearing, the probation officer indicated that she wanted the juvenile to attend Valley Vocational Evening Support Program (VVESP) for six months. The court agreed and reinstated the juvenile to probation with the general condition that the juvenile "attend school as required by law." The juvenile was brought back before the court after failing to attend VVESP during the summer. The defense contended that no specific condition of probation existed ordering the juvenile to VVESP, only attend school as required by law. Since the law did not require school attendance during the summer, the juvenile had committed no violation of his stated conditions. The court did not accept this argument and found the juvenile in violation. He was continued on probation. The juvenile appealed.

The court of appeals agreed with the juvenile that his failure to attend VVESP was not a violation because there was no written condition of probation to this effect. The second issue raised in this case was whether the juvenile violated his probation by failing to follow the oral directive of the probation officer. "We conclude that probation revocation is an area of juvenile law in which the adult criminal requirement regarding written notice of the terms of probation upon which revocation is based is appropriately applied as a principle of due process and general fairness. . . . We further conclude that written notice of this term of probation was necessary before its violation could support the juvenile's probation revocation." The juvenile court's revocation order was vacated, and the matter remanded.

Proposition 200

In re Fernando C., 294 Ariz. Adv. Rep. 22 (1999) - Proposition 200 does not include juveniles, only adult drug users.

Following the juvenile's adjudication as a delinquent following several drug charges, he was committed to the State Department of Juvenile Corrections. He appealed, contending that he was a non-violent drug offender and should have been on probation and provided treatment according to A.R.S. §13-901.01.

Since A.R.S. §13-901.01 refers to any person who is "convicted," and juvenile adjudications, pursuant to A.R.S. §8-207(A) shall not be deemed a conviction of a crime, are not convictions, the juvenile was not entitled to sentencing under this statute. If the legislature had intended so, it would have made similar reference to "convicted or adjudicated" as was done in A.R.S. §31-281. The adjudication and disposition were affirmed.

Public Record

Arizona Department of Economic Security v. O'Neil, 190 Ariz. Adv. Rep. 18 (1995) - The attorney-client privilege exists for information between DES and the Attorney-General's office and is protected.

The Phoenix Newspapers, Inc. (PNI) sought the release of all information from the Department of Economic Security (DES) regarding the custody status of a 14-year-old girl who committed suicide. PNI acknowledged that the information it sought was confidential under A.R.S. § 8-546.07, but nonetheless argued that release was appropriate under A.R.S. § 8-546.07(E). DES responded that it did not object to the release if proper, but asked that anything protected by the attorney-client privilege be redacted. Judge O'Neil reviewed the matter and ordered the release of the material without redacting. DES filed a special action seeking to determine if the balancing prescribed in A.R.S. § 8-547.07(E) encompasses, abrogates or alters the attorney-client privilege between DES and the Attorney-General's office.

The court of appeals vacated Judge O'Neil's order. "We therefore conclude that because the relationship between DES and the Arizona Attorney General is one of attorney and client, their communications are protected by the attorney-client privilege, and that protection is not subject to the balancing prescribed by A.R.S. § 8-546.07(E). That both are governmental agencies neither alters the nature of the relationship nor the level of protection."

Restitution

In re Devon G., 293 Ariz. Adv. Rep. 21 (1999) - Victims' restitution claims submitted after a court-imposed deadline can be added to the conditions through a modification. Since any modification requires notice and a hearing, the rights of all parties will be protected.

When the juvenile was placed on probation, he agreed to pay restitution not to exceed $10,000. At the time of the disposition hearing, only one of the 26 victims had submitted a timely claim. The juvenile was ordered to pay $312.36 restitution. A week later, two other victims submitted claims. The state filed a motion for a restitution hearing. The juvenile court denied the motion as untimely. The state appealed.

Pursuant to A.R.S. §8-241(D)(1), a juvenile is to make full or partial restitution to the victim. In *State v. Steffy*, 173 Ariz. 90, 839 P.2d 1135 (App. 1992), the court held that victims do not waive their right to restitution by failing to contact the court in a timely manner. Similarly in *State v. Contreras*, 180 Ariz. 450, 885 P.2d 138, the court of appeals held that a trial court may modify probation to impose restitution after probation is ordered and in the absence of grounds supporting revocation.

However, the court of appeals has been less consistent in juvenile restitution orders than the two adult cases cited. In *In re Frank H*., 281 Ariz. Adv. Rep. 28, a panel affirmed the juvenile court's refusal to order restitution which was ordered after the deadline set by the court. That holding was based upon *In re Eric L.*, 189 Ariz 482, 943 P.2d 842 which held that cutting off restitution claims was necessary to preserve the juvenile's right to appeal.

In the present matter, the court of appeals found the reasoning more persuasive in *In re Alton D.*, __ Ariz. __, 970 P.2d 452 (App. 1998) which limited *Frank H*. so that restitution deadlines do not cut off the rights of victims by way of a modification as was done in *Contreras*. This is particularly persuasive since any modification requires notice and a hearing, ensuing the rights to all parties would be protected. The juvenile court's denial of the state's motion for a restitution hearing was reversed.

In re Alton D., 285 Ariz. Adv. Rep. 10 (1999) - Victims are not precluded from requesting restitution after the court-imposed deadline. Restitution can be added to the conditions through a modification.

At the juveniles' adjudication hearing, he agreed to pay restitution not to exceed $3,000. The court issued an order setting a deadline by which victims had to advise the court of any restitution claims. The state appealed the court's deadline.

Although the court of appeals seemed to distinguish this case from the holding *In re Frank H*, 281 Ariz. Adv. Rep. 28 (1999) because the juvenile agreed to pay restitution in this matter, it went on to "disagree that victims are barred from bringing a subsequent claim for restitution during the period of the juvenile's probation" as was decided in *Frank H*. It noted that restitution is not waived by the victim's failure to provide information. See *State v. Contreras*, 180 Ariz. 450, 454, 885 P.2d 138, 142 (App. 1994) and *State v. Holguin*, 177 Ariz. 589, 591, 870 P.2d, 407, 409 (App. 1993) See *Maricopa County Juv. Action No. 128676*, 177 Ariz. 352, 354, 868 P.2d 365, 367 (App. 1994)(juvenile cannot be ordered to pay restitution absent evidence that victim's loss is directly related to juvenile's offense) and *Maricopa County Juv. Appeal No. J-96304*, 147 Ariz. 153, 155, 708 P.2d 1344, 1346 (App. 1985)(court cannot order a speculative amount of restitution).

In determining that the juvenile court can add restitution through modification, the court of appeals observed that if the juvenile court chooses to modify the conditions of probation to include restitution, that

modification order is appealable. Thus, the juvenile's right of appeal is preserved while permitting the victim to apply for restitution as provide in statutes. The court of appeals went on to hold that . . .

> the juvenile court has the authority to modify the terms of probation to impose a specific amount of restitution when and if that amount becomes ascertainable during the period of the juvenile's probation, in an amount not exceeding what the juvenile has agreed to pay, after notice and a hearing, despite its indication to consider the issue "closed" for purposes of entering a timely initial disposition order . . . To the extent this is inconsistent with the holding in Frank H. that a procedural disposition deadline may foreclose a victim from asserting a statutory right to restitution during the juvenile's probationary period, we disagree in part with that opinion.

In re Frank H., 281 Ariz. Adv. Rep. 28 (1998) - The court may set a deadline for victims' restitution claims in order to allow the juvenile to appeal his/her adjudication.

The court of appeals consolidated eight cases in which the state appealed the trial court's holding that the court had the ability to set a deadline for victims to claim restitution. The court of appeals affirmed the trial courts' decisions.

In its holding, the court of appeals acknowledged that the court, on its own discretion, may modify the conditions of probation of an adult criminal defendant to include payment of restitution after probation was imposed in accordance with *State v. Contreras*, 180 Ariz. 450, 885 P.2d 138 (App. 1994). However, the court reasoned that there was nothing in this ruling that precluded a judge from setting a deadline. Because the juvenile justice system prohibits a juvenile from appealing until a final order is entered [*Maricopa County Juvenile Action No. J-74222*, 20 Ariz App. 570, 571, 514 P.2d 741, 742 (1973)], the court reasoned that a dilatory victim could virtually preclude the juvenile from ever appealing his adjudication. In setting a deadline, the court must balance the juvenile's rights against those of the victims receiving restitution. Any deadline must be reasonable. Otherwise the state may appeal. In the current matters, the state offered no showing that the deadlines were unreasonable. [See subsequent rulings in *In re Devon G.*, 293 Ariz. Adv. Rep. 21 (1999)]

In re Erika V., 297 Ariz. Adv. Rep. 55 (1999) - Parents have a right to restitution for lost wages taking the victim to counseling and for attending court hearings.

The juvenile was found delinquent of aggravated assault and placed on probation and ordered to pay restitution which included an amount for time the victim's parent had to be away from work to take their daughter to medical appointments. The juvenile appealed, arguing that the court should not have ordered restitution for the parents' lost wages because Arizona Revised Statutes §8-341(g)(1) does not authorize restitution for the victim's family.

The court of appeals looked to adult case law for a precedence in which a third party who stood in the shoes of the victim was paid restitution and found *State v. Prieto*, 172 Ariz. 298, 836 P.2d 1008 (App. 1992) (restitution ordered to DES for counseling for victim and her mother) and *State v. Merrill*, 136 Ariz. 300, 665 P.2d 1022 (App. 1983) (restitution to insurance carrier which reimbursed victim). These are distinguished from cases where a third party did suffer losses, but did not step into the shoes of the victim. *State v. French*, 166 Ariz. 247, 801 P.2d 482 (App. 1990) (motel owner could not claim restitution for damage to room in which

assault occurred) and *State v. Whitney*, 151 Ariz. 113, 726 P.2d 210 (App. 1985) (damages to car were not attributable to offense of car theft).

If the victim had been an adult, she would have been entitled to restitution for lost wages when obtaining medical treatment. *State v. Lindsley*, 191 Ariz. 195, 953 P.2d 1248 (App. 1997). Since the victim was a juvenile and her parents had a requirement to take the victim for medical treatment, they stood in the shoes of the victim and were entitled to restitution for lost wages. Moreover, since the victim had a right to attend the court hearing pursuant to the Victims' Bill of Rights and as a minor, her parents could exercise her rights and attend hearings, they were likewise entitled to restitution for lost wages when they attended court hearings. The restitution order was affirmed.

In re Kory L., 295 Ariz. Adv. Rep. 19 (1999)- Since the juvenile's mother can be responsible for restitution, she has standing to appeal, does not have a right to a court-appointed counsel, but does have a right to a restitution hearing as part of due process.

Kory L. pleaded guilty to criminal trespass and stipulated to $4,362.62 restitution. When Kory's mother was told that she could be ordered to pay this restitution also, she requested a restitution hearing, which was granted. At the hearing, the court ruled that she was bound by Kory's stipulation as to the amount of restitution. She appealed.

On appeal, the state contended that Kory's mother had no standing to appeal since a parent is not a party to a delinquency proceeding. However, the court of appeals noted that she was named in the restitution order, and according to Rule 24 of the Arizona Rules of Procedure for the Juvenile Court, any aggrieved party may appeal from a final order of the juvenile court.

The court of appeals then determined that Kory's mother did not have a right to a court-appointed attorney at Kory's delinquency hearing. While parents may have attorneys at delinquency hearings, there is no statute providing court-appointed counsel. Therefore, the juvenile court did not err in not appointing her counsel at the restitution hearing.

The parents had also argued that they, as innocent parties, were being punished, therefore A.R.S. §8-34 was unconstitutional. The court of appeals reiterated that restitution is not punishment and making parents financially responsible for misbehaving children is well-established public policy in Arizona. Therefore A.R.S. §8-34 was consistent with that policy and not unconstitutional.

However, Kory's mother did have a right to a meaningful hearing on restitution prior to it being imposed on her, since A.R.S. §8-34(H) would allow the court to order her to pay the stipulated restitution for the juvenile. Due process requires that before she is deprived of property, that she be given an opportunity to be heard at a significant hearing. Since the juvenile court announced at the restitution hearing that she was bound by the juvenile's stipulation, that hearing lost its meaningfulness. The matter was remanded to allow Kory's mother to have a meaningful restitution hearing.

In re Eric L., 241 Ariz. Adv. Rep. 8 (1997) - The court can order partial restitution, depending upon the juvenile's age, physical and mental condition and earning capacity.

At the juvenile's adjudication hearing, he agreed to admit to one count of attempted burglary and theft, and agreed to pay restitution, not to exceed $1,000.00. Following a restitution hearing, the commissioner ordered the juvenile to pay $654.10 believing she had no discretion by statute to do otherwise, even though she did not believe the 13-year-old could pay it. The juvenile appealed.

The court of appeals noted A.R.S. § 8-241(D) provides for either full or partial restitution, depending on the court's consideration of the juvenile's "age, physical and mental condition and earning capacity." The restitution order was reversed and remanded for reconsideration of these factors.

Maricopa County Juvenile Action No. JV-132905, 221 Ariz. Adv. Rep. 21 (1996)

After the juvenile entered a plea agreement to pay restitution for damages to a vehicle he stole, he objected to the imposition of restitution noting the vehicle was already damaged when he took it. He appealed the restitution order.

The court of appeals noted this matter differed from *Juvenile Action No. JV-128676*, 177 Ariz. 352 (App. 1994) in which the juvenile was only a passenger in the stolen vehicle. In the present matter, the juvenile admitted the theft and acknowledged responsibility for restitution by signing the plea agreement. "Because the loss suffered by victim could have been inferred to have been caused by juvenile's admitted criminal conduct, because no credible evidence was submitted by juvenile to refute this inference, and because juvenile agreed to pay restitution for losses relative to his criminal conduct, we affirm the juvenile court's order of restitution."

Maricopa County Juvenile Action No. JV131701, 202 Ariz. Adv. Rep. 76 (1995) - Victims cannot testify by telephone. Telephonic testimony is permitted only in dependency and termination hearings.

The juvenile was adjudicated delinquent based on her admission to a charge of attempted theft of an automobile. The plea agreement provided that she would pay restitution in an amount to be determined at a hearing. Since the victim had moved out of state, the court allowed the victim to testify over the telephone with the juvenile and counsel present. The court established restitution based upon this testimony. The juvenile appealed. The court of appeals determined that since Rule 19.2 allows telephonic testimony only in dependency or termination of the parent-child relationship hearings, the juvenile court exceeded its authority in permitting telephonic testimony in this delinquency case. The restitution order was vacated and the matter remanded for a new restitution hearing.

Maricopa County Juvenile Action No. JV-128676, 158 Ariz. Adv. Rep 8 (1994) - losses must be "directly attributable to the offense" or be something that would not have occurred "but for" the juvenile's conduct in order to be included as restitution.

The juvenile accepted a ride in a car stolen by another juvenile. When the stolen car was recovered, the victim sustained losses of personal property and damages to the car. At the time of the juvenile's adjudication for criminal trespass, the juvenile court held him to be jointly and severally liable for the damages and losses. The juvenile was ordered to pay restitution. The juvenile appealed.

The court of appeals applied the same logic to this juvenile matter as has been applied to adult cases involving restitution. The court held that since there was no evidence that the victim's losses directly resulted from the juvenile's criminal trespass, restitution could not be imposed. The state did not establish the losses were "directly attributable to the offense" or was something that would not have occurred "but for" the juvenile's conduct. The restitution order was vacated.

Maricopa County Juvenile Action No. J-96304, 708 P.2d 1344 (1985) - The court must determine juvenile's ability to pay before assessing restitution.

The juvenile was committed to the State Department of Corrections and ordered to pay restitution following a disposition hearing for a burglary charge. The juvenile appealed maintaining that the court erred by failing to ascertain the juvenile's ability to pay and including unearned commissions in the restitution order.

The court of appeals agreed with the juvenile's argument in each matter. Noting that the primary focus of juvenile dispositions is on rehabilitation, " . . . requiring a juvenile to pay restitution in an amount beyond his means only serves to defeat this salutary purpose." The court of appeals found that the restitution amount was based upon speculated lost wages and denied the order. The case was remanded for further proceeding in accordance with this opinion.

Search and Seizure

In re Roy L., 312 Ariz. Adv. Rep. 19 (2000)

After receiving reliable information that the juvenile was carrying a hand gun, a Phoenix Police Officer stopped him. When asked if he had a gun, the juvenile said yes. The officer found it in the juvenile's pants pocket. The juvenile was arrested. He was subsequently charged with minor in possession of a firearm and committed to the Arizona Department of Juvenile Corrections. The juvenile appealed, arguing the juvenile court should have suppressed all the evidence resulting from the illegal search.

The court of appeals denied the juvenile's appeal. It found the officer had reasonable cause to stop the juvenile, that the Miranda warning did not have to be issued until after the juvenile admitted he had the weapon and he was arrested, that the state did not have to prove that the weapon was operable and that there was no basis other than the juvenile's statements to believe his behavior was necessary for self protection. The adjudication and disposition were affirmed.

Maricopa County Juvenile Action No. JT30243, 220 Ariz. Adv. Rep. 52 (1996)

The juvenile was walking away from a group of 20 other teenagers when two uniformed police officers arrived and indicated that they needed to see her with all the other juveniles. She returned to the group. When the officers asked if any of the teenagers had cigarettes on them, she acknowledged that she did. She was cited and released. The juvenile filed a motion to suppress which the juvenile court granted finding that the confession had resulted from illegal questioning. The state appealed.

The court of appeals confirmed the dismissal. Using the "reasonable person" test of *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Florida v. Royer*, 460 U.S. 491 (1983), the court of appeals held that the officers detained the juvenile without any reasonable, objective grounds to do so.

Sex Offender Registration

Maricopa County Juvenile Action No. JV-132744, 226 Ariz. Adv. Rep. 34 (1996)

The juvenile pled guilty to sexual contact with a minor. He appealed the order requiring him to register as a sex offender pursuant to A.R.S. § 13-3821. He argued that this statute allowed the juvenile court jurisdiction over him beyond his eighteenth birthday, registration violated the confidentiality of the juvenile court, and registration was an *ex post facto* law.

The court of appeals did not agree and affirmed the juvenile court's orders. In its ruling, the court of appeals noted the statute terminates the requirement for a juvenile to register when the person reaches the age of twenty-five. "Redress for a failure to keep the sheriff advised of a change of address after the registrant turns eighteen does not reside in the juvenile court, but depends upon the filing of a new criminal charge in the adult court."

The court of appeals went on to note that it recently addressed a closely related question in *Maricopa County Juvenile Action Nos. JV-512600 and JV-512797*, 221 Ariz. Adv. Rep. 38 (App. July 23, 1996). In those cases, the juveniles argued that DNA testing results that would be used beyond their eighteenth birthdays also extended the juvenile court's jurisdiction. In that opinion, the court of appeals held that the applicable statute allowed the juvenile court "to control such children . . . as provided by law." They concluded that the results of the DNA tests could be used after the juveniles passed their eighteenth birthdays.

In addressing the confidentiality question, the court of appeals noted registration information was available only to law enforcement agencies and not included in the recently enacted community notification law. As to the retroactive application of the statute, the court of appeals relied upon the supreme court's ruling in *State v. Noble*, 171 Ariz. 171 (1992). In that decision, sex offender registration was viewed as regulatory rather than punitive. The same argument was held to be valid for juveniles.

Time in Detention

Cochise County Juvenile Delinquency Action No. JV95000239, 221 Ariz. Adv. Rep. 44 (1996) - juveniles committed to a juvenile facility may not be entitled to credit for pre-adjudication custody unlike those juveniles who are remanded to the adult court.

The juvenile was adjudicated delinquent and committed on September 1, 1995 for a minimum of two years. The juvenile appealed this order claiming 1) the sentence was *ex post facto* and 2) he should be credited with time he spent in custody.

The court of appeal affirmed the sentence as imposed by the juvenile court. It held the "two year" commitment amendment was in effect at the time the juvenile was committed. Concerning the second issue, the court of appeals noted that in *State v. Ritch*, 160 Ariz. 95 (App. 1989) a previous appellate division held " . . . [j]uveniles who are subsequently committed to a juvenile facility, however, may not be entitled to credit for pre-adjudication custody (unlike those juveniles who are remanded to the adult court)."

JV 502820 v. Superior Court in Maricopa County, 182 Ariz. Adv. Rep. 37 (1995) - Dependent children cannot be placed in detention.

The seventeen-year-old juvenile was made a ward of the court and committed to the care of the Arizona Department of Economic Security (DES) Child Protective Services (CPS). She was brought into the detention facility on a Saturday evening for disorderly conduct after CPS refused to take her. At Intake, her parents and CPS again refused to take her. She was put into detention. At the detention hearing on Sunday afternoon, the commissioner learned the state had filed no delinquency petition but CPS had asked the court not to release her to anyone except her caseworker on Monday morning. The juvenile objected to this request. The court ordered her to be detained until a responsible party from CPS came to pick her up. The court noted ". . . the sole reason for detention is the fact that there is no responsible party here from the State to take this ward." The juvenile was released to CPS Monday afternoon. A special action was filed.

Although the issue was moot for the petitioner, the court of appeals granted review because the issue was serious and capable of repetition and "review-avoidance." Relief was granted. "Simply stated, there is no provision in the Arizona statutes for the juvenile court to order that a dependent child be detained. Children who are allegedly delinquent or incorrigible may be detained in certain circumstances, but not other children." The court held ". . . children can be detained only if they are alleged to be delinquent or incorrigible and only in compliance with Rule 3, Rules of Procedure for Juvenile Court following appointment or waiver of counsel pursuant to A.R.S. § 8-225(C)."

JV-130549 v. Superior Court, 161 Ariz. Adv. Rep. 39 (1994) - In Rule 3, "incorrigible acts" should be included with "delinquent conduct."

In a special action, the 15-year-old appealed the juvenile judge's ruling to order his detention once he was determined to be incorrigible. The juvenile admitted to an allegation that he had run away from home as alleged. The court found that " . . . the child's best interest requires necessary protection . . . This Court believes that if the child is released, he presents a serious danger to himself and, therefore should be detained pending Disposition". The juvenile appealed, relying upon Rule 3(d) that "No child shall be held in detention for more than 24 hours . . . " Contending that he was incorrigible, not delinquent, the juvenile argued the court had no authority to detain him for more than 24 hours.

The court of appeals found that the juvenile had made a legitimate argument based on a drafting ambiguity in Rule 3, but concluded that the ambiguity should be resolved by interpreting the rule to include "incorrigible acts" with "delinquent conduct". The Court went on to distinguish this matter from *Gila County Juvenile Action No. DEL-6325 v. Duber*, 169 Ariz. 47 (1991), which involved post-disposition detention rather than pre-disposition detention as in this case. Relief was denied.

Gila County Juvenile Action No. Del. 6325 v. Duber, 94 Ariz. Adv. Rep. 76 (1991)

The juvenile court does not have jurisdiction (legislative authority) to impose a period of detention as punishment for incorrigibility.

Transfer to Adult Court

In re Mario L., 257 Ariz. Adv. Rep. 5 (1997) - The juvenile court can alter its decision to remand based upon additional information.

The juvenile was arrested for aggravated assault with a deadly weapon. The state requested a transfer to adult court. The juvenile court denied the transfer request and placed him on probation. A month later, the juvenile was charged with a drive-by shooting. The state requested that the juvenile be transferred to the adult court. The court neither granted nor denied, instead deferred the transfer hearing for three months. Later, the juvenile was charged with two other offenses which occurred prior to the time the court deferred the transfer hearing. Upon notice of the new offenses, the juvenile court granted the transfer request. The juvenile appealed.

The court of appeals held that the juvenile court had a reasonable basis to change its order. The transfer was affirmed.

Saucedo v. Superior Court in La Paz County, 251 Ariz. Adv. Rep. 25 (1997) - Automatic transfer as provided in Proposition 102 could not be applied to matters prior to its effective date.

With the passage of Proposition 102 in November 1996, certain chronic and violent juvenile offenders were to be automatically transferred to the adult court. The amendment became effective December 6, 1996. This appeal involved a prosecution that took place after the effective date. The state filed for an automatic transfer. The juvenile objected. When the court denied the juvenile motion, he filed a special action.

The court of appeals held that Proposition 102 lacked any statement of intended retrospective application and judges could not give such to its application. To do so would violate the *ex post facto* clauses of both the Arizona and United States Constitutions. For that reason, the trial court was ordered to dismiss the automatic prosecution of the juvenile as an adult, and consider whether he should be transferred under previous provisions.

Maricopa County Juvenile Action No. JV-511576, 219 Ariz. Adv. Rep. 6 (1996) - Ineffective Assistance of Counsel

The juvenile appealed his transfer hearing to adult court, arguing that he had received ineffective assistance of counsel. The court of appeals noted that although *Pima County Juvenile Action No. J-47735-I*, 26 Ariz. App. 46 (1976) indicated that the right to counsel may not apply in juvenile proceedings, the United States Supreme Court held otherwise in *Kent v. United States*, 383 U.S. 541 (1966), noting ". . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, *without effective assistance of counsel.*" In this matter, the defense counsel did not present a second, more favorable psychological evaluation that had obtained at the juvenile's expense, did not call the psychologists at the transfer hearing, did not seek a continuance to interview witnesses, and did not return the parents' telephone calls. At the transfer hearing, the defense counsel relied solely upon the court-appointed psychologist and probation officer, and did not cross-examine them. The court of appeals held it was

"compelled to agree with the juvenile that, on the facts present here, the attorney's performance was deficient as measured by reasonable professional standards . . . We therefore hold that the juvenile did not receive constitutionally effective assistance of counsel in the transfer hearing, and we reverse and remand for proceedings consistent with this opinion."

Maricopa County Juvenile Action No. JV-127231, 186 Ariz. Adv. Rep. 71 (1995) - Juvenile has the right to question the probation officer who prepared the transfer report.

At a transfer hearing, the juvenile judge denied the juvenile's request to cross-examine the probation officer who prepared the transfer report and who was present. The denial was based upon the conclusion the officer's testimony would not supplement the information contained in the report and that he was not qualified to comment on issues related to the Adobe Mountain School. The juvenile appealed.

Citing *Kent v. United States*, 383 U.S. 54, the court of appeals agreed that " . . . due process and fundamental fairness require that the juvenile be afforded that opportunity [to question the author of the report]". *Cochise County Juvenile Delinquency Action No. DL 88-00037*, 164 Ariz. 417 (App. 1994); *Romley v. Superior Court*, 163 Ariz. 278 (App. 1989); and *Pima County Juvenile Action No. J-47735-1*, 26 Ariz. 46 (1976) each allude to the existence of the right to question the probation officer regarding the transfer report. In this matter, the court of appeals held the juvenile judge's ruling was premature and an abuse of discretion. "We believe that all juveniles have a right to question the author of a transfer report that would lead a judge to conclude that there is 'no likelihood of reasonable rehabilitation of the juvenile.'" The case was reversed.

State and J.C.S., a juvenile v. Superior Court of Arizona in Navajo County, 177 Ariz. Adv. Rep. 68 (1994) -The prosecutor has the right to dismiss charges and transfer hearing and the juvenile court had no right to override the prosecutor's decision.

A delinquency petition was filed against J.C.S., a 15-year old juvenile, and another juvenile charged with burglary, armed robbery, aggravated robbery, kidnaping, aggravated assault, theft, criminal damage, unlawful flight, and endangerment. The state requested that both juveniles be transferred to the adult court for criminal prosecution. Before the transfer hearing, the state and J.C.S. agreed to dismiss certain charges against the juvenile who would, in turn, agree to testify against the other juvenile. As part of this agreement, the state agreed to withdraw the request to transfer J.C.S.'s case to the adult court. At the transfer hearing, the state informed the court of a number of reasons it had been decided to treat J.C.S. differently than the other juvenile. Despite these reasons, the juvenile court denied the state's motion to dismiss the transfer request. The court found that, "When a complaint is filed with the Court the state cannot dismiss that complaint without [the] approval of the Court and certainly the area of juvenile law which is only quasi-criminal and quasi-civil, the Court is of the opinion that the motion for transfer cannot be dismissed without approval of the Court." The state and the juvenile appealed.

The court of appeals noted the juvenile court had not disputed that Rule 12(a), Rules of Procedure for the Juvenile Court establishes that the prosecutor is the official who determines whether to request that a juvenile be transferred for adult prosecution. The court of appeals went on to distinguish this matter from *State ex rel. Romley v. Superior Court*, 170 Ariz. 339, 823 P.2d 1347 (1991), upon which the juvenile court had based its decision. In *State ex rel. Romley*, the state and the juvenile tried to circumvent the juvenile court by

agreeing to waive the transfer hearing and allow the juvenile to plead as an adult in the superior court. In that matter, the court of appeals held that Rule 14 " . . . mandates that 'the [juvenile] court shall . . . determine whether the public safety or interest would be best served by the transfer . . . '" In the current matter, the parties were not attempting to deprive the juvenile court of jurisdiction to *suspend* a juvenile criminal prosecution. Instead, the state's motion to withdraw the transfer was affirming, rather than circumventing, the jurisdiction of the juvenile court. Consequently, *State ex rel. Romley* did not provide authority for the court's refusal.

The court of appeals, relying upon separation of powers doctrine, cited numerous cases where " . . . the court had no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers." *State v. Murphy*, 113 Ariz. 416; *Maricopa County Juvenile Action No. J-81405-S*, 122 Ariz. 252; *Maricopa County Juvenile Action No. JV-122733*, 172 Ariz. 542; and *State v. Ramsey*, 171 Ariz. 409. Accordingly, the court of appeals found the prosecutor in this matter was simply exercising his authority to initiate proceedings against J.C.S. in juvenile court, and the juvenile court had no right to override the prosecutor's decision. In denying the state's request to dismiss the transfer hearing, the juvenile court had abused its discretion. Relief was granted.

Coconino County Juvenile Action No. J-12187, 178 Ariz. Adv. Rep. 43 (1994) - the juvenile's "residence" or "domicile" remained in Coconino County even while he was incarcerated in Maricopa County.

In 1991, the Juvenile Court in Coconino County adjudicated the juvenile delinquent for crimes committed in that county and placed him on probation. Subsequently that probation was revoked and the juvenile was committed to the Adobe Mountain Juvenile Institution in Maricopa County. He was released on parole and returned to Coconino County. In 1994, the juvenile committed several armed robberies. He was eventually returned to Adobe Mountain where he committed another series of crimes. The Juvenile Court in Coconino County transferred the juvenile to the adult court for the offenses committed in Maricopa County. The juvenile court then ordered the case transferred to Maricopa County for trial. The juvenile appealed asserting that Coconino County was not the appropriate forum to consider his transfer to adult court.

The court of appeals upheld the juvenile court's action. The court of appeals noted A.R.S. § 8-206 provides:

> A. The venue of proceedings in the juvenile court shall be determined by the county of the residence of the child, of the county where the alleged delinquency, dependency, or incorrigibility occurred or is committed.
> B. Where the residence of the child and the situs of the alleged delinquency, dependency or incorrigibility are in different counties, invoking proceedings in one county shall bar proceedings in the others.

The court of appeals noted the juvenile's "residence" or "domicile" remained in Coconino County even while he was incarcerated in Maricopa County. Therefore, Coconino County was a proper venue for the delinquency petition and for hearing the motion to transfer for prosecution as an adult.

The court of appeals went on to explain that it relied upon the venue statute and not on the *Yavapai County Juvenile Court Action No. A-27789*, 140 Ariz. 7 (1984) cited by the state. By using the venue statute, it would be proper to bring proceedings for a single offense in more than one county. However, the statute requires that there may be only one proceeding and one adjudication for each offense. This would

preclude any problem of double jeopardy or double punishment. Accordingly, the court of appeals observed that it is possible for a juvenile to commit offenses in different counties, the juvenile then could be treated as an adult in one county and as a juvenile in the others. "There is nothing necessarily inappropriate about this, and nothing in our law forbids it." The order transferring the juvenile to the adult court in Maricopa County was affirmed.

Cochise County Juvenile Delinquency No. DL 88-00037, 793 P.2d 570 (1990)

Testimony of the minor's probation officer, who was familiar with his juvenile record, was admissible in proceeding to transfer minor to superior court for prosecution as adult; any failure of the officer to conduct adequate investigation prior to preparing report was a matter which went to the weight of testimony, not to its admissibility.

Liability Issues

Public officials, acting in their discretionary functions, are not entitled to absolute immunity. *Grimm v. Arizona Board of Pardons and Paroles*

In addition to "course and scope" of employment, the court will also determine "authorization" of a person's responsibilities in determining whether an agency and/or the state is vicariously liable. *State of Arizona v. Schallock*

Probation officers, in preparing and submitting pre-sentence reports to the court, are entitled to absolute immunity because the pre-sentence report is an integral part of the sentencing process. However, not all the activities of a probation officer in supervising a probationer are entitled to immunity. Much of the work of a probation officer is administrative and supervisory. Such activities are not part of the judicial function; they are administrative in character and therefore not entitled to absolute immunity. *Acevedo v. Pima County Adult Probation Department*

A probation officer may not assert for immunity unless the officer is acting pursuant to or in aid of the directions of the court. Any possible claim to immunity ceases when the officers ignored the specific direction of the court and acts contrary to the court's directive. *Acevedo v. Pima County Adult Probation Department*

Probation officers are part of the judicial function and state employees regardless if the county subsidized their salaries. *State v. Pima County Adult Probation Department.*

Juvenile probation officers are not absolutely immune from liability in their pre-adoptive investigative and supervisory functions. *Adams v. The State of Arizona*

"Discretionary" acts are protected by immunity while "ministerial" acts are subject to liability. "Discretionary" acts were defined as those involved in the formulation of policy, while "ministerial" acts were those related to the execution of policy. *Weissich v. United States*

Members of the Board of Pardons and Paroles have limited immunity and can be held liable for the grossly negligent or reckless release of a highly dangerous prisoner. *Grimm v. Arizona Board of Pardons and Paroles*

The appointment of probation officers is vested solely with the presiding judge and the board of supervisors must fund such appointments. *Broomfield v. Maricopa County*

Clouse v. State of Arizona, 284 Ariz. Adv. Rep. 16 (1998) - Actions Against Public Entities or Public Employees Act, A.R.S. §12-820 to 12-823 confers absolute and qualified immunity on various public entities and employees.

David Van Horn stole a truck in Maricopa County and was arrested in Pinal County. He was detained there by until authorities from Maricopa County could transport him. Arriving several days later, the officers learned that no charges had been filed against Van Horn yet. They decided to transport him anyway. En route, the deputies determined that Van Horn could not be detained because he had not seen a magistrate within 48 hours as is required. So, they released him. Van Horn subsequently killed a woman in New Mexico. Her husband sued the state and Maricopa County.

The officers invoked A.R.S. §12-820.02(A)(1) which requires proof of gross negligence. The plaintiffs moved for a directed verdict, claiming this statute was unconstitutional. The jury ultimately apportioned 15% fault to Maricopa County and 0% to the state. The plaintiffs appealed the judgement in favor of the state arguing that A.R.S. §12-820.02(A)(1) is unconstitutional because it abrogates the common law right to sue the government for negligence.

The court of appeals outlined that *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P.2d 107 (1963) abolished government immunity in Arizona. The court held in that case that ". . . where negligence is the proximate cause of injury, the rule is liability and immunity is the exception." The next major case to address government liability was *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982). In that matter, the Arizona Supreme Court abandoned the concept that state employees owed a duty to the public but not an individual, making them coexist. In response, the legislature enacted the Actions Against Public Entities or Public Employees Act, A.R.S. §12-820 to 12-823 which conferred absolute and qualified immunity on various public entities and employees.

In the present matter, the court of appeals held A.R.S. §12-820.02(A)(1) was a constitutional grant of governmental immunity. The judgements were affirmed.

State of Arizona v. Schallock, 248 Ariz. Adv. Rep. 3 (1997) - the authority given a supervisor, his methods of operating the office, the agency's ruling board's tolerance of those methods, and the lack or presence of sexual harassment policies or grievance procedures are factors that were used to determine supervisor's actions were within the course and scope or authorization of his employment, making the agency liable as well as the supervisor.

The Arizona Supreme Court addressed whether the Arizona Prosecuting Attorneys Advisory Council (APAAC) must indemnify its former executive director, Allen Heinze, against his personal liability for sexual harassment damages awarded to two former employees. The court of appeals determined that since Heinze was not acting in the course and scope of his employment, the state was not responsible for indemnifying Heinze in the awarded damages of $1,476,535.50.

The Arizona Supreme Court chose to follow federal guidelines in the sexual harassment case *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, in which agency law should be used to determine employer liability for a supervisor's actions. Since no agency establishes procedures that allow sexual harassment, the Arizona Supreme Court emphasized that the A.R.S. § 41-621(A)(3), which provides coverage for officers acting in the "course and scope of employment," also contains the words "*or authorization*." The court interpreted "authorization" as applying to vicarious liability found outside the course and scope of employment. In other words, an agency is vicariously liable outside the scope of employment if the supervisor's actions were spoken on behalf of the agency and were aided by his or her relationship to the agency.

In the present matter, Heinze spoke and acted for APAAC. He ran their day-to-day business for them and had control of the employees. APAAC kept him in that position over a decade, knowing or having

reason to know of his past sexual behavior. As stated in *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, (4th Cir. 1995):

> Moreover, under common law agency principles, an employer is also liable for an employee's wrongful acts, even if those acts are not committed within the actual scope of his employment, if the employee uses his apparent authority to accomplish the wrongful acts and so is acting within the "apparent scope" of his employment.
>
> The Arizona Supreme Court went on to find:
>
> We believe the record in this case, including the authority given Heinze, his methods of operating the office, APAAC's tolerance of those methods, and the lack or presence of sexual harassment policies or grievance procedures are factors that . . . do not establish that Heinze's acts were not within the course and scope or authorization of his employment."

The court of appeals' summary judgment in favor of the state was vacated. The matter was remanded to the court of appeals.

McCleaf v. State of Arizona, 236 Ariz. Adv. Rep. 19 (1997) - The decision whether to seek to secure the presence of a probationer at revocation proceedings is an exercise of the sort of 'quasi-prosecutorial' or 'quasi-judicial' function that is entitled to immunity. The judge determines if a probationer should be incarcerated pending a violation hearing. Since judges are immune, the state is not liable for injuries caused by defendant being released pending a violation.

In early 1987, Josie Sanchez pled guilty to possession of a dangerous drug, a class four felony. During her presentence investigation, Sanchez reported that during the year preceding her arrest, she and her husband consumed five cases of beer daily. As a result, she was determined to be a high risk and intensive probation was recommended. She was granted three years intensive probation.

In November, 1987, Sanchez violated her probation by missing curfew and cashing her check to buy alcohol. In December, she failed to report to her probation officer. In March, she again violated curfew. Between April and September, 1988, no random drug testing was imposed on Sanchez.

In August or September, 1988, a newly hired probation officer, with one week's training and a degree in management, was assigned to supervise Sanchez. The new probation officer met with Sanchez because she had indicated that she was losing it. After the meeting, she felt she had things under control.

On September 7, 1988, Sanchez accompanied another probationer to buy some heroin. When they were unsuccessful, they bought and consumed a quantity of alcohol instead. After Sanchez drove her friend's car into a fence, police arrived and determined she was intoxicated. Because she gave the officers a false name, they did not realize she was on probation. She was released after being cited for DUI.

Later that evening, Sanchez called her surveillance officer and admitted the DUI arrest. The probation officer filed a petition to revoke, requesting that a summons be issued rather than a warrant. Although the sentencing judge usually issued warrants, he decided, based upon the officer's recommendation, to issue a summons. Sanchez subsequently admitted the violation and was scheduled for a disposition hearing on October 19, 1988.

On October 14, 1988, Sanchez accompanied another probationer to purchase alcohol. After a day

of heavy drinking, Sanchez drove through a stop sign, colliding with a vehicle driven by McCleaf. McCleaf and her daughter were injured. Her six-year-old son was killed.

McCleaf brought action against the state, claiming gross negligence in its supervision of Sanchez's probation and in its failure to place her in custody following her arrest for DUI. The state moved to dismiss on grounds of absolute immunity. The trial court denied the motion.

At the conclusion of the presentation of evidence at the trial, the court granted the state's motion for a directed verdict, holding there was insufficient evidence of gross negligence and insufficient evidence that any of the state's purported negligent acts were the proximate cause of the accident. The plaintiff appealed that judgement and the denial of a new trial.

Turning to *Acevedo v. Pima County Adult Probation Department*, 142 Ariz. 319 (1984), the court of appeals noted that in that decision the supreme court held:

> Probation officers, in preparing and submitting pre-sentence reports to the court, should be entitled to absolute immunity because the pre-sentence report is an integral part of the sentencing process. *We also believe that a probation officer is entitled to absolute protection from suit for actions which are necessary to carry out and enforce the conditions of probation imposed by the court*. (Emphasis added.)

The court of appeals reasoned that "[A]ctions undertaken by probation officers in connection with revocation proceedings should be protected because such proceedings enforce judicially imposed conditions of probation . . . However, the holding in *Acevedo* is that no probation officer immunity attaches to acts which contravene court directives, and this holding requires that we proceed cautiously in defining the scope of such immunity."

> The determination to seek revocation of probation of an offender, or to refrain from doing so notwithstanding the offender's violation of probation, may be entitled to the same immunity that prosecutors enjoy as to the decision to initiate a prosecution, . . . since both prosecutors and probation officers are empowered to commence revocation proceedings . . . The decision whether to seek to secure the presence of a probationer at revocation proceedings by recommending that the court issue an arrest warrant may likewise be an exercise of the sort of 'quasi-prosecutorial' or 'quasi-judicial' function that is entitled to immunity . . . However, we need not decide such issues here because, under the facts of this case, these acts of gross negligence, if such they were, were not the cause of the harm.
>
> Our review of the record establishes that, by the time Judge Helm made the effectual release decision in this case, Sanchez had been brought into court on allegations of probation violation, and the judge had been provided the information reasonably necessary to make a responsible decision whether to jail Sanchez pending the revocation hearing. Whether the probation officers were dilatory in moving to revoke Sanchez's probation, whether they should have urged that a warrant issue, they clearly provided Judge Helm with the occasion and means to lock her up. The rest was up to him.
>
> The trial court correctly determined that the failure of probation officers in this case to timely initiate revocation proceedings or to recommend the issuance of an arrest warrant did not make the state liable to plaintiff.

The plaintiff also argued that if the probation officer had arrested her on the night of her first DUI,

Sanchez would not have been out of custody to harm plaintiff. The court of appeals held " . . . it was Judge Helm's decision, . . . allowing her to remain out of custody pending disposition." They reasoned that the judge's authority to incarcerate was not constrained by the probation officer.

> At the time Sanchez inflicted grievous harms on plaintiff and her children, she was free on Judge Helm's order. The trial court here properly concluded that the failure of probation officers to arrest Sanchez did not proximately cause plaintiff's injuries. Judge Helm should have jailed Sanchez, but he cannot be held liable because he is immune. Plaintiff's argument fails because, when responsibility for a determination of Sanchez's release status shifted to Judge Helm, the judicial decision not to incarcerate Sanchez became a superseding cause of the harms to plaintiff and precluded the assignment of liability to the probation officers.

Lastly, the plaintiff asserted that probation department had been negligent in hiring the assigned officer and placing Sanchez on his caseload. The court of appeals ruled that the trial court was correct in its directed verdict on this question because the jury would have to speculate whether a different program or officer would have been successful. The plaintiff did not prove that other programs or officers would have kept Sanchez from reoffending.

In conclusion, the court of appeals ruled "[T]he failure of probation officers to arrest Sanchez, to properly initiate revocation proceedings and request a warrant, or to provide different supervision over Sanchez's probation, did not proximately cause plaintiff's harm. The judgment and the order denying the motion for new trial are affirmed."

Adams v. The State of Arizona, 206 Ariz. Adv. Rep. 24 (1995) - DES workers' immunity. DES preplacement workers are not absolutely immune from liability for the type of pre-adoptive investigative and supervisory negligence alleged in this case.

The plaintiff is one of two sisters who, at the ages of seven and eight, were placed in a foster home by the Department of Economic Security(DES). Shortly after their placement in the foster home, the girls were molested by their foster father, who eventually adopted the girls. When the girls were 11 and 12, they reported the molestations to the police. The adoptive father was sentenced to prison and the adoptive mother was placed on probation.

The girls sued the state and the DES social worker who was assigned to complete the court's review of the foster parents before the adoption was supposed to be approved by the court. They alleged both were negligent in that if they had followed the DES regulations, they would have discovered that their adoptive father had been sexually abused as a child, had previously sexually abused his adult stepdaughter during her teenage years and that he was sexually abusing the girls soon after they were placed in his home.

The state and social worker moved for summary judgment based on absolute judicial immunity, relying in part on an affidavit from Judge Rose which stated that he "directed all adoption caseworkers to use the Guidelines; that strict compliance was mandatory and part of the judicial process of certifying adoptive parents." The trial court granted this motion, citing *Lavit v. Superior Court*, 173 Ariz. 96 (App. 1992) and *Maricopa County Juvenile Action No. JD-6236*, Ariz. Adv. Rep. 65 (App. 1994). The girls appealed.

"The nature and scope of judicial immunity raise perplexing and somewhat amorphous issues, which are not susceptible to easy resolution in some cases. This is such a case." Beginning with *Grimm v.*

Arizona Bd. Of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) and moving to *Acevado v. Pima county Adult Probation Department*, 142 Ariz. 319, 690 P.2d 38 (1984), the court of appeals analyzed the merits of judicial immunity in relation to the facts of this case. As noted in *Acevado*, one basis for judicial immunity is acting pursuant to a court order. The court of appeals held the defendants were acting primarily upon statutes and not a court order. A second basis for judicial immunity is completing certain activities essential to the functioning of the judicial system. "Examples include submitting presentence reports, *Acevado*; submitting child-custody evaluations and recommendations, *Lavit*; initiating the filing of child dependency petitions, *Nation and Meyers v. Contra Cost County Dept. Of Social Service*, 812 F.2d 1154 (9th Cir. 1987); submitting adoption recommendations, *Wooldridge v. Virginia*, 453 F.Supp. 1333 (E.D. Va. 1978); and making reports and recommendations to the court as a guardian ad litem, *Barr v. Day*, 124 Wash. 2d 318, 879 P.2d 912 (1994). *Acevado* and *Lavit*, however, did not address the type of investigative functions at issue in this case. Appellants challenge only the investigative and supervisory aspects of appellees' duties, not the submission of investigative and home study reports or certification and adoption recommendations to the juvenile court. While the latter function probably would be shielded by absolute immunity, appellees have cited no authority for granting such immunity for the former functions . . . Although the DES caseworkers undoubtedly worked closely with the juvenile court, we cannot say that their routine and statutorily-required investigative and supervisory functions were conducted as an integral part of the judicial process."

In reviewing this case for judicial immunity based upon "policy considerations," the court of appeals first reviewed "accountability" factors. "Appellees contend that . . . the juvenile court's review of investigative and home study reports submitted by caseworkers . . . are sufficient to hold caseworkers accountable for their actions. Theoretically that may be true, but we cannot say it was true in this case or is true in most cases."

The court of appeals went on to review if disallowing absolute immunity would deter acceptance or performance of the DES social workers duties as noted in *Lavit*. Since they are statutorily mandated to complete these investigations, and the reports and recommendations are shielded by absolute immunity, the court of appeals did not find this a reason to grant immunity.

Thirdly, the court of appeals noted,

> The most important policy objective in granting absolute judicial immunity is to prevent undue influence from the threat of lawsuits and liability that could discourage fearless, independent action by public employees. *Grimm.* . . . Without question, fearless decision making is critical to DES caseworkers submitting reports and making certification and adoption recommendations to the courts. We certainly want caseworkers to decide what is best for adoptive children without worrying about lawsuits from disgruntled adoptive parents. The same concern does not hold, however, for caseworkers' investigation of the adoptive parents and child or for supervision of adoptive family post-placement. Such activities do not require the same type of decision making . Indeed, the fear of potential liability should not deter DES caseworkers from freely and independently performing their jobs, but it arguably could motivate them to conduct thorough investigations and to closely supervise adoptive families. In turn, diligent investigation and supervision should improve the reports and recommendations caseworkers submit to the courts, ultimately benefitting adoptive children. It is, of course, the children's best interests that are paramount considerations in this context. . . . In our view, the benefits of granting absolute immunity to appellees in this context are outweighed by the risks, most notably subjecting children to the potentially devastating and life-long damages of an ill-advised adoptive relationship. By this

> decision, we of course express no view on the merits or ultimate resolution of appellants' claims. In addition, we need not and do not decide whether appellees are shielded by qualified immunity . . . because those issues were not raised . . . We only hold that appellees are not absolutely immune from liability for the type of pre-adoptive investigative and supervisory negligence alleged here.

State v. Superior Court for Maricopa County, 210 Ariz. Adv. Rep. 32 (1996) - A county attorney investigator who seized documents in New Mexico with an Arizona subpoena duces tecum which was invalid in New Mexico was protected by qualified immunity in a civil action.

The trial court declined to grant qualified immunity to an Apache County Attorney's employee who was involved in an criminal investigation that included documents from a company in New Mexico. The investigator met with the president of the New Mexico firm and told him that he had a subpoena duces tecum, but the Arizona subpoena had no legal force in New Mexico. The president allowed him to seize and remove documents anyway. These documents were eventually determined in the criminal matter to have been illegally obtained because it was unclear if the president had consented to the search. Following the resolution of the criminal matter, the criminal defendant filed a civil suit against the investigator. The trial court in this matter declined to grant the investigator qualified immunity. The state appealed.

The court of appeals held that the investigator was protected by qualified immunity. "It is simply not possible to fairly conclude that a reasonable officer would have thought his search unlawful based on consent obtained in these circumstances. As a result, summary judgment upholding the qualified immunity defense was required."

Northern Insurance Co. v. Morgan, 200 Ariz. Adv. Rep. 35 (1995)

The insurance company refused to defend Morgan in a civil case involving his sexually harassing one of his employees. Morgan claimed that the harassment was not intentional. Citing *Continental Insurance Co. V. McDaniel*, 160 Ariz. 183, 772 P.2d 6 (App. 1988), the court of appeals affirmed the trial court's grant of summary judgment to the insurance company, finding the acts of sexual harassment were intentional and excluded from liability policy covering the company and employees.

State v. Schallock, 196 Ariz. Adv. Rep. 35 (1995) - A supervisor whose acts are not within statutes is afforded no indemnity for his personal liability to the employees upon whom he preys.

The state appealed a declaratory judgment that required it to indemnify Allen Heinze, the executive director of the Arizona Prosecuting Attorneys' Advisory Council (APAAC), for damages that he caused by sexually harassing APAAC employees. In a civil trial, Heinze and APAAC were found liable to Schallock for ". . . intentional infliction of emotional distress and/or sexual harassment in the workplace." The jury awarded a verdict of $1,476,553.50 against Heinze and $908,446.50 against APAAC. The state moved to seek a declaratory judgment that no defendants in this matter were entitled to state coverage for claims against Heinze, and Heinze was not entitled to indemnity, and the state was not required to defend Heinze. The trial court denied this motion and ordered the state to pay Schallock's full judgment against Heinze and declared the state responsible for Heinze's liability to another defendant. The state appealed.

The court of appeals noted that the state was correct in asserting that " . . . Heinze is provided coverage only if his acts were performed . . . in the course and scope of employment or authorization." In Arizona, an employee acts within the course and scope of employment if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits; and

(c) it is actuated, at least in part, by a purpose to serve the master. *Love v. Liberty Mut. Ins. Co.*, 158 Ariz. 36, 760 P.2d 1085 (App. 1988). The court of appeals went on to note it recently held that, " . . . under common law principle, 'an employee's sexual harassment of another employee is not within the scope of employment.'" *Smith v. American Express Travel Related Servs. Co.*, 179 Ariz 131, 876 P.2d 1166 (App. 1994). " . . . In short, our holding is limited by the insurance statute, which indemnifies only state employees 'acting in authorized governmental or proprietary capacities and in the course and scope of employment or authorization.' A.R.S. § 41-621(A)(3). Because Heinze's acts were not within this statute, it affords him no indemnity for his personal liability to the employees upon whom he preyed."

Carroll v. Robinson, Cox, Williams, DHS, and DES, 164 Ariz. Adv. Rep. 76 (1994)

Carroll was director of a preschool his mother operated in Yuma. In early 1987, the State Departments of Human Services (DHS) and Economic Security (DES) were notified of three allegations of child sexual abuse against Carroll. Since DHS licensed and DES contracted with the preschool, both agencies investigated the allegations. They were "unable to determine" on the first allegation and "could not substantiate" the second allegation. In the third allegation, the investigators met with the child who indicated to them that Carroll touched him. They also learned from the Yuma Police that the child had told them that he had been touched by another person, not Carroll. In June, 1987, Robinson of DHS sent a letter to the Carroll's mother demanding that Carroll be removed from his position or the school would face legal action from DHS. Cox of DES also sent Carroll's mother a letter indicating that the school's agreement with DES was canceled due to "allegations of sexual abuse by a member of your staff." Carroll attempted to have the matter reviewed by Ted Williams, Director of DHS. Williams declined to change the decision and informed Carroll there was no avenue of appeal.

Carroll pursued civil action against the defendant claiming their actions: defamed him, interfered with the business relationship between him and his employer, inflicted severe emotional distress, and deprived him of constitutionally protected property and liberty interest without due process. When the trial court issued a grant of summary judgment for the defendants, Carroll appealed.

The first question the court of appeals reviewed was whether or not Carroll was entitled to trial on his state tort claims. The trial court found that Carroll failed to present evidence that could convince a reasonable person that the defendants acted with actual malice, and thus the defendants were entitled to qualified immunity. "Once an immunity defense has been raised properly, the court determines whether defendants are entitled to immunity." *Chamberlain v. Mathis*, 151 Ariz. 551 (1986); *Green Acres Trust v. London*, 141 Ariz. 609 (1984). Qualified immunity protects state officers and employees from liability for the good faith exercise of their discretionary authority. Although the general rule of governmental immunity from tort liabilities was abandoned by the Arizona Supreme Court in 1963 *Stone v. Arizona Highway Commission*, 93 Ariz. 384 (1963), the court continues to recognize governmental immunity in some areas. In *Ryan v. State*, 134 Ariz. 308 (1982), the Arizona Supreme Court said: "Employing the spirit of the *Stone* decision, we propose to endorse the use of governmental immunity as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy. Otherwise, the state and its agents will be subject to the same tort law as private citizens."

There is limited governmental immunity for discretionary administrative actions. A.R.S. § 41-621 (I), *Chamberlain*, and *Evenstad v. State*, 144 Ariz. Adv. Rep. 55 (1993). State officials are within their discretionary authority when they set policy or perform an act that inherently requires the exercise of their judgment or discretion. *Chamberlain* and *Evenstad*. Conditional or limited immunity does not establish an absolute defense. A plaintiff may establish abuse of a limited immunity by showing actual malice, i.e., that the defendant acted with knowledge of a statement's falseness or with reckless disregard of whether the statement was true. *Lewis v. Oliver*, 149 Ariz. Adv. Rep. 47 (1993). In this matter, since Carroll specifically alleged that the defendants acted " . . . within the course and scope of their duties as officials of the State of Arizona," the trial court appropriately granted the defendants' motion for summary judgment. The trial court determined the caseworkers exercised their discretion in this matter and were not acting out of malice towards Carroll.

The court of appeals next addressed the question if the defendants' actions caused his termination and branded him without due process of law, giving rise to an action under 42 U.S.C. section 1983. "Qualified immunity protects an official from civil liability in a section 1983 action for conduct which does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Since Carroll's liberty interest and right to procedural due process were clearly defined at the time of the defendants' actions, and a question of fact existed as to whether defendants reasonably should have known that they were violating Carroll's rights, the trial court erred in granting summary judgment.

Weissich v. United States, 4 F.3d 810 (9th Cir. 1993) - The federal probation office's policy leaves notification to the officer's discretion which protects them by the discretionary function exception of the Federal Tort Claims Act.

After being sentenced to prison in 1955, Malcolm Schlette threatened to retaliate by killing the district attorney, William Weissich. Eleven years later, Schlette was released from prison. Authorities discovered that he planned to carry out his threat and returned him to prison. In 1975, Schlette completed his prison sentence. In 1983, he was placed on federal probation for being in possession of a weapon. Three years later, he shot and killed Weissich. The victim's widow brought action against the U.S. Probation Service for failing to warn the victim and negligently supervising Schlette. The district court dismissed the action. Mrs. Weissich appealed, arguing that failure to warn was not a matter of choice for the probation officers; that the

USPS guidelines imposed a mandatory duty on the officers to warn a foreseeable victim of a risk of harm imposed by probationers. The guidelines provide:

> Probation officers have an obligation to protect the public, as well as promote the rehabilitation of the probationer. In meeting these dual obligation, the probation officer has a duty to warn specific third parties of a particular prospect of harm, physical or financial, which the officer "reasonably foresees" the probationer may pose to them. The obligation exists whether or not the third party has solicited the information.
> (1) The circumstances of all persons under probation supervision should be reviewed periodically to determine whether they might pose a reasonably foreseeable danger to a third person. The guidelines apply to probationers who already have secured employment as well as ones presently seeking employment.
> (2) The guidelines are selective. A warning is not required in every case, only where a reasonably foreseeable risk of harm to a specific third party is believed to exist.
> Determination of Risk. The determination of whether a "reasonably foreseeable" risk exists depends upon a selective case-by-case evaluation. The evaluation should be based upon, among other factors, (1) the probationer's job; (2) his or her prior criminal background and conduct; and (3) the type of crime for which he was convicted. Special attention should be paid to employment or other circumstances which present the probationer with an opportunity or temptation to engage in criminal or antisocial behavior related to his criminal background.
> Reasonably Foreseeable Risk. "Reasonably foreseeable" means that the circumstances of the relationship between the probationer and the third party, e.g., employer and employee, suggest that the probationer may engage in a criminal or antisocial manner similar or related to his past conduct.
> Decision Regarding Disclosure. (1) If the probation officer determines that no reasonably foreseeable risk exists, then no warning should be given. (2) If the probation officer determines that a reasonably foreseeable risk exists, he or she shall decide, based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his rehabilitation, whether to: (a) give no warning, but increase the probationer's supervision sufficiently to minimize the risk; (b) give no warning, but preclude the probationer from employment; or (c) give a confidential warning to the specific third party sufficient to put the party on notice of the risk imposed.--Guide to Judiciary Policies and Procedures Probation Manual, Vol. X Chapter 4 (1983).

Relying upon this material, the court of appeals noted that this policy leaves notification to the officer's discretion which protects them by the discretionary function exception of the Federal Tort Claims Act. In addressing the claim that the officers negligently supervised the probationer, the court of appeals held that this was also discretionary and protected. The district court's dismissal was upheld.

State v. Pima County Adult Probation Department, 147 Ariz. 146 (1985) - Arizona probation departments are part of the state judiciary system and covered by state insurance.

After the trial court entered summary judgment that the Pima County Probation Department officers were employees of the state or county for insurance purposes, the state appealed arguing that the department was not part of the judicial department of the state and they were not entitled to insurance coverage because they had acted outside the course and scope of their employment.

The court of appeals dismissed both arguments. Relying upon A.R.S. § § 12-251 through 254 and *Broomfield v. Maricopa County*, 112 Ariz. 565 (1975), the court of appeals confirmed that probation officers are part of the judicial function and state employees regardless if the county subsidized their salaries. The court of appeals went on to note that in the *Acevedo* ruling the court " . . . did not establish that the officers were not acting within the course and scope of their employment; rather, it merely established that their actions were not protected by judicial immunity . . . Thus, although in this case the probation officer acted contrary to the court's directive, the state may nevertheless be held liable . . . Because the state and not the county had the right to control the allegedly negligent probation officers in their supervision of Jesse Christopher, and because the probation officers acted in furtherance of the state's business of supervision probationers, we find that the probation officers are covered under A.R.S. § 41-621 and therefore the trial court correctly granted summary judgment."

Acevedo v. Pima County Adult Probation Department, 142 Ariz. 319 (1984) - In Arizona, probation officers who prepare and submit pre-sentence reports to the court are entitled to absolute immunity because the pre-sentence report is an integral part of the sentencing process. Not all the activities of a probation officer who supervises a probationer are entitled to immunity. Much of the work of a probation officer is administrative and supervisory. Such activities are not part of the judicial function; they are administrative in character.

On appeal to the Arizona Supreme Court, Acevedo continued to urge that judicial immunity not be invoked because the officers did not act pursuant to the court's directive. The Arizona Supreme Court agreed. In a landmark decision, the Arizona Supreme Court ruled that " . . . probation officers, in preparing and submitting pre-sentence reports to the court, should be entitled to absolute immunity because the pre-sentence report is an integral part of the sentencing process." It did not agree " . . . that all the activities of a probation officer in supervising a probationer are entitled to immunity. Much of the work of a probation officer is administrative and supervisory. Such activities are not part of the judicial function; they are administrative in character."

The Arizona Supreme Court went on to hold that " . . . a probation officer cannot assert for immunity unless the officer is acting pursuant to or in aid of the directions of the court. The evidence which the appellants advance indicates that the probation officers acted *contrary* to the court's directive . . . Any possible claim to immunity ceased when the officers ignored the specific direction of the court." The opinion of the court of appeals and the trial court's judgment were reversed.

Acevedo v. Pima County Adult Probation Department, 142 Ariz. 360 (1983)

In 1974 Jesse Christopher was placed on ten years' probation for molesting his daughter and step-daughter. In July 1978, Christopher was charged with molesting his three step-sons. He was placed on twenty years probation, confined to the county jail for two years with work furlough, and ordered to have no contact with children under the age of 15. While in work furlough, Christopher obtained employment with Adolfo Acevedo, having lied about the nature of his conviction. Acevedo signed and returned the "Employer

Agreement" form which explained the conditions of work furlough and indicated that Christopher had undergone extensive screening to become eligible for the program. Following his release, Christopher sought to rent a room from Ventura Valenzuela who was also serving time in the county jail as a condition of probation. Valenzuela, who lived with his wife and five children asked his probation officer if he could rent a room to Christopher. The officer gave Valenzuela permission to do so. Both Acevedo and Valenzuela later asserted that they were never advised of the nature of Christopher's conviction or conditions of probation. The probation officer avowed that Valenzuela was made aware of both. Beginning in the summer of 1981, Christopher sexually assaulted the Valenzuela and Acevedo children as well as their playmates. He was subsequently sentenced to life imprisonment.

Acevedo and Valenzuela sought damages from the Probation Department, alleging the officers had negligently supervised Christopher in violation of a specific court order and statutory law. The officers filed to dismiss. The trial court granted this motion for summary judgment on the ground that the officers were immune from liability. Acevedo appealed.

The court of appeals upheld the trial court's ruling. It noted a probation officer "stands in the shoes" of the superior court judge in carrying out the order of the court and is answerable only to the judge. The judge may not supervise his probationers because of time constraints. The probation officer performs the duty for him. The court of appeals relied in part on *Broomfield v. Maricopa*, 112 Ariz. 565 (1975) in which the Arizona Supreme Court stated that probation officers are part of the judicial function and that the judiciary has inherent power of control over probation officers. Acevedo contended that even if the officers enjoyed judicial immunity, they would not be covered in this instance because of their allegedly negligent performance of their duties. The court of appeals relying upon *Davis v. McAteer*, 431 F.2d 81 and *Davis v. Quarter Sessions Court*, 361 F.Supp. 720 in which judicial immunity was applied where negligence on the part of the court employees was the basis for the appeals, denied this contention. The court of appeals upheld the summary judgment, holding "that absolute judicial immunity applies to probation officers performing their duties at direction of a superior court judge, regardless of whether probation officers' activities are considered ministerial in nature."

Rieser v. District of Columbia, 563 F.2d 462 (1977) - “Discretionary" acts of federal parole officers are protected by immunity while "ministerial" acts are subject to liability.

Thomas Whalen had a long history of assaults on women. In 1962, he was sentenced to serve 6 to 18 years in a federal facility in Washington, D.C. During his imprisonment, he was examined by a psychiatrist who reported, "I believe that when released to the community he will pose a serious potential danger." In 1971, he was paroled. Some time later, Whalen's parole officer referred Whalen to the Department of Correction's employment service. The parole officer did not mention the parolee's past conviction for rape or the psychiatrist's evaluation. He told the employment counselor that in his opinion, based on Whalen's work record, Whalen would be a good employee. He placed no limitations upon the types of work he considered appropriate for Whalen, and did not advise the counselor that the parolee was being investigated by police for an unsolved rape-murder at his last place of employment.

Whalen was referred to an apartment complex where he became a maintenance worker. The parole officer maintained that he subsequently told the parolee's supervisor that the parolee had been convicted of rape and should not be given keys or permitted to work by himself. However, the superintendent later testified that he remembered only being told not to allow Whalen to work alone. When the parole officer learned that Whalen was suspected of another unsolved rape-murder, he petitioned the parole board to revoke

Whalen's parole. They declined because there were no hard facts of guilt. Whalen was promoted, and unknown to the parole officer, sometimes assigned to work alone and given keys to apartments.

Several months later, police officers investigating the unsolved murders met with the general manager of the apartment complex that employed Whalen. They advised the manager of all of Whalen's convictions, the psychiatric report and the unsolved murders. The manager allowed Whalen to keep his job. The officers warned the manager not to let Whalen work alone or to have access to the keys to residents' apartments. The officers advised the parole officer of the meeting. Subsequently, Whalen raped and killed a resident.

As part of the subsequent litigation, the victim's family brought suit against the parole officer and the District of Columbia. In its ruling, the federal court relied upon the distinction between "discretionary" and "ministerial" acts of the parole officer. It noted that "discretionary" acts are protected by immunity while "ministerial" acts are subject to liability. "Discretionary" acts were defined as those involved in the formulation of policy, while "ministerial" acts were those related to the execution of policy. In this instance, the court found that the parole officer was " . . . under a clear duty, defined by Department of Correction's policy, to disclose Whalen's full adult record in the referral . . . [The parole officer] was similarly under a duty to provide adequate supervision for Whalen's parole." His actions were not protected by immunity. The court noted that the parole officer's " . . . position as a parole officer vested in him a general duty to reveal to a potential employer Whalen's full prior history of violent sex-related crimes against women, and to ensure that adequate controls were placed on his work . . . [The parole officer's] continuing failure to provide adequate supervision not only contributed to the absence of controls that resulted in [the victim's] death, but also permitted the assignment of Whalen to increasingly responsible jobs and thus was in part a contributing cause to [the manager's] decision not to terminate his employment. This failure of supervision continued to the time of [the victim's] death."

Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260 (1977) - The Arizona Supreme Court held that absolute judicial immunity should be enjoyed only by participants in judicial proceedings. It abolished the absolute immunity previously granted to public officials in their discretionary functions.

In 1973, the Parole Board released Mitchell Blazak after he had served one-third of his sentence imposed for armed robbery and assault with intent to kill. In December 1973, Blazak killed one man and permanently injured another during a robbery. The victims' families brought a wrongful death and personal injury suit against the Board and its members claiming that their gross negligence and reckless release of Blazak caused the harm for which they sought redress. The trial court and court of appeals dismissed the victims' claims. The victims appealed to the Arizona Supreme Court.

In their appeal, the victims noted that the Board had been grossly negligent and disregarded the public's safety by not taking into consideration reports available to them from eight different psychiatrists that Blazak was dangerous before determining to release him on parole. In summary these reports indicated: Blazak was an extremely dangerous person who should not be free in society until some major psychological changes took place; he was a paranoid schizophrenic whose psychosis prevented him form distinguishing between right and wrong and controlling his conduct; he had never made adequate adjustment to society for any prolonged period and was unlikely to change; and he had a definite potential for violence.

The Arizona Supreme Court first addressed the issue of the Board's absolute immunity as granted by *Wilson v. Hirst*, 67 Ariz. 197 (1963). In that case, the Arizona Supreme Court had extended the immunity enjoyed by judges for their judicial acts to other public officials performing a judicial function while acting in a

quasi-judicial capacity. In reevaluating this principle, the Arizona Supreme Court held that absolute judicial immunity should be enjoyed only by participants in judicial proceedings. It abolished the absolute immunity previously granted to public officials in their discretionary functions and over-ruled *Wilson v. Hirst*.

> We have come to this conclusion because of the increasing power of the bureaucracy -- the administrators-- in our society. The authority wielded by so-called faceless bureaucrats has often been criticized. Comparing the relatively small number of judges with the large numbers of administrators, the idea of fearless, unbridled decision-making becomes less appealing. While society may want and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking outrageous actions. In any case, democracy by its very definition implies responsibility . . . In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous.

The Arizona Supreme Court went on to determine whether the Board members in this matter were protected by qualified immunity. They held

> . . . that members of the State Board of Pardons and Paroles owe a duty to individual members of the general public when the Board decides to release on parole a prisoner with a history of violent and dangerous conduct toward his or her fellow human beings. The standard of care owed, however, is that of avoiding grossly negligent or reckless release of a highly dangerous prisoner. If the history of an applicant for parole shows a great danger of violence to other humans, the members of the Board are under a duty to inquire further before releasing the prisoner. With medical and psychological evaluations, plus the day-to-day evaluations of the prison personnel, the Board should have access to sufficient information to make an informed decision. If the entire record of the prisoner reveals violent propensities and there is absolutely no reasonable basis for a belief that he has changed, then a decision to release the prisoner would be grossly negligent or reckless . . . We believe that a limited immunity for members of the Board of Pardons and Paroles with liability only for the grossly negligent or reckless release of a highly dangerous prisoner strikes the proper balance between the competing interests. The public has an interest in protection from premature release of highly dangerous prisoners as well as an interest in holding public officials responsible for outrageous conduct. The Board members have an interest in freedom from suit for reasonable decisions.

The Arizona Supreme Court went on to rule that the victims should have a chance to show that the Board's release of Blazak was grossly negligent or reckless and vacated the court of appeal's opinion. The case was remanded to the trial court.

Broomfield v. Maricopa County, 112 Ariz. 565 (1975) - The legislature has vested exclusively the appointment of probation officers with the presiding judge.

Judge Broomfield ordered the Board of Supervisors to implement his appointment of a probation officer. When the Board ignored his order, Judge Broomfield filed a special action with the Arizona Supreme Court. The Arizona Supreme Court concluded that the legislature had vested exclusively the appointment of probation officers with the presiding judge and that " . . . this is appropriate because such officers are part of the judicial function. The Board of Supervisors has no authority in the appointment process. They are required by law, as a ministerial duty, to provide the funds necessary to pay the salary of the probation officers appointed by the presiding judge pursuant to the statute [A.R.S. § 12-251(A)]." The Board was ordered to comply.

Miranda Rights

General Principles

The defendant's right to not incriminate himself or herself is established by the Bill of Rights.

The requirement of police officers to provide this right to suspected offenders was established by *Miranda v. Arizona*.

If probation officers discuss crimes other than these to which the defendant has pled, the officers must advise the defendant of *Miranda* rights. *Arnett v. Ricketts* and *Jones v. Cardwell*.

Statements about an unrelated offense made to a probation officer without *Miranda* warnings may be used in a probation violation but not in new charges. *State v. Magby*.

Arnett v. Ricketts, 665 F. Supp. 1437 D (1987)

One reason given for overturning defendant's death sentence was that the probation officer did not give defendant Miranda warning. The defendant admitted having prior convictions during the presentence interview. These admissions alone were used to aggravate the sentence. Further, the probation officer used California Department of Correction records which included a psychological report designating the defendant as a pedophile. Since the defendant had no opportunity to confront the doctors who prepared this evaluation, the court ruled his rights had been violated.

Jones v. Cardwell, 686 F.2d 757 (1982)

The defendant was advised in writing and verbally that he was under court order to follow all instructions during the presentence process. The probation officer questioned the defendant about the convicted crime as well as any additional criminal activity for which the defendant was responsible.

The defendant admitted guilt to other uncharged offenses and provided a written confession which was attached to the presentence report. The sentencing judge relied upon this information in imposing the sentence. The federal court held the defendant's Fifth Amendment rights were violated.

State v. Magby, 554 P.2d 1272 (1976)

Statements made to a supervising probation officer by an in-custody defendant about a new crime committed while on probation may be used in probation violation hearing without advising of Miranda rights. However, without Miranda rights these statements may not be used during the trial on the new charge.

State v. Smith, 112 Ariz. 415, (1975)

This case provides citations in which probation officers do not need to give Miranda warnings to probationers regarding probation violation matters, but police must.

State v. Fimbres, 501 P.2d 14 (1972)

The defendant's statements to the probation officer did not violate his privilege against self-incrimination. The probation officer was allowed to testify about defendant's admissions of committing a new crime while on probation.

Miscellaneous

State v. Mott, 189 Ariz. Adv. Rep. 35 (1995) - The preclusion of battered woman syndrome evidence constituted a denial of due process.

The defendant was convicted of child abuse and murder as a result of the death of her daughter at the hands of her boyfriend. During the trial, the court precluded a witness from providing testimony regarding the Battered Woman Syndrome. She appealed her conviction. The court of appeals was "persuaded that the preclusion of [the witness'] proffered battered woman syndrome evidence constituted a denial of due process, we reverse and remand for a new trial."

Reinesto v. O'Neil, Judge, Superior Court in Navajo County, 189 Ariz. Adv. Rep. 38 (1995)

In a special action, the court of appeals concluded that Arizona's child abuse statute does not apply to injury to fetus resulting from a mother's use of heroin during pregnancy.

Ridenour v. Schwartz, 166 Ariz. Adv. Rep. 20 (1994) - An administrative order closing courts at 3 p.m. daily unconstitutionally limited public access to the judicial system.

In response to Maricopa County's efforts to reduce an anticipated budget deficit, Presiding Judge Rose issued an administrative order closing the courts at 3 p.m. each day. The defendant, who was in the midst of a trial when the administrative order went into effect, moved to have a public trial, or in the alternative, to dismiss the charges. The trial court denied the motion. The defendant sought special action from the Arizona Supreme Court.

The Arizona Supreme Court cited reasons in which it felt the closing did not prevent the defendant from having a public trial. However, the Court went on to find the order

> . . . unconstitutional on separation of powers grounds: the legislative or executive branches cannot, through lack of proper planning, budgeting or funding, require the judicial branch to take cost-cutting measures so severe that the operation of the judicial system cannot be carried out in a constitutional manner . . . Particularly given the volume of work in our courts today, it is not permissible for another branch of government to convert the third and equal judicial branch into a part-time operation."

The defendant's request for a mistrial was denied. However, because the administrative order unconstitutionally limited public access to the judicial system, the order was vacated and its enforcement permanently stayed.

State v. Moerman, 179 Ariz. Adv. Rep. 35 (1994)

The defendant was convicted of carrying a weapon in a "fanny pack" designed to carry a concealed weapon. The court of appeals confirmed the conviction holding that a "fanny pack" is not a case for the purposes of A.R.S. § 13-3102 (F).

Patterson v. Maricopa County Sheriff's Office, 147 Ariz. Adv. Rep. 84 (1993)

The Maricopa County Employee Merit System Rules precluded the detention officer from maintaining his job and the unpaid and nonpartisan town council position. The court of appeals found the rule did not prevent the officer from maintaining his elected position and job with the Sheriff's Office. A summary judgment was affirmed.

Cox Arizona Publications v. Collins, 137 Ariz. Adv. Rep. 5 (1993) - Police reports are public documents and the state has an obligation to prove why they should not be released. A public official cannot act in an arbitrary and capricious manner when deciding what to release and when to release them.

Reporters for the local newspapers made written requests to the Phoenix Police Department for access to its investigative reports on The Phoenix Suns' drug case. Shortly thereafter, Maricopa County Attorney Tom Collins had a subpoena served on the police department ordering the surrender of the investigative reports. The reporters requested the reports from the prosecutor's office. Collins refused. In a special action before Judge Cates, Collins advanced arguments based on generalized claims of broad state interest, that the release of the reports would jeopardize fair trials for the defendants, hamper ongoing investigations, burden the prosecutors, inhibit future witnesses from speaking with police, violate grand jury secrecy laws, and impair the privacy of people mentioned in the report. When the trial court asked why the records were not being offered for an *in camera* inspection, the reply was that such a procedure would be too burdensome and it would be impossible to determine what should or should not be released. The court ordered Collins to release the reports to the newspapers. Collins sought a special action in the court of appeals. Pending this appeal, Collins reported that the criminal proceedings were completed.

The court of appeals declared the special action moot and returned the matter to the trial court. Collins released redacted version of the reports to the newspapers. The newspapers filed to recover attorneys' fees, arguing that Collins had wrongfully denied access to public records by acting in bad faith or in an arbitrary or capricious manner. The trial court granted the award. Collins appealed to the Arizona Supreme Court.

The Arizona Supreme Court noted that there was no dispute that the reports were "public records," and no statutory exception to disclosure applied in the case. Collins argued only that legitimate state interests and his own ethical obligations compelled him not to release the police reports. The Arizona Supreme Court indicated that the burden fell upon Collins, as a public official, to overcome the legal presumption favoring disclosure. Since police reports are not generally exempt from public records law, Collins had to specifically demonstrate how release would violate privacy or be detrimental to the best interest of the state. The Arizona Supreme Court held that Collins had acted in an arbitrary and capricious manner, deciding on his own what to release and when to release it, even to the court. "He neither produced the records for an *in camera* review, nor offered a redacted version to the court or media until after the criminal trial was over. Having set himself up as sole judge and jury, Collins took the chance that his decision would be viewed as arbitrary and

capricious." The award to the newspapers was granted.

Weller v. Arizona Department of Economic Security (DES), 132 Ariz.. Adv. Rep. 21 (1993) - A person discharged for failing drug testing is eligible for unemployment benefits if the employer does not show that his intoxication is connected to impairment at work, rather than an arbitrary cut-off level of drug testing.

The appellant was discharged from his job when his urinalysis sample tested positive for marijuana at a level established by his employer. The appellant applied for and received unemployment benefits. The employer appealed.

The court of appeals upheld the award of unemployment benefits noting that, among other things, the court was not requiring unemployment benefits be paid to those who abuse drugs in the workplace or who are intoxicated at work due to drug abuse elsewhere. Rather, the court held that the employer did not meet its burden of proof by failing to connect the positive sample to intoxication or impairment at work, and that the cutoff level of testing was anything but an arbitrary decision by the employer. The employer's substance abuse policy did not address impairment at work, but rather established an arbitrary threshold of intoxication without relating it to impairment at work.

Parole

State v. Murray, 298 Ariz. Adv. Rep. 24 (1999) - Changes to laws governing parole eligibility cannot be applied retroactively.

The defendant was sentenced under Arizona Revised Statutes §13-604 and 604.02, requiring flat-time sentences. However, since the defendant was also sentenced on other offenses, he became eligible for parole after serving two-thirds of his sentence after the Arizona Supreme Court ruled in *State v. Tarango*, 182 Ariz. 246, 250-251, 895 P.2d 1009, 1013-1014 (App. 1994). Some months later, the legislature enacted emergency legislation, overturning *Tarango*. The State Department of Corrections asserted this made the defendant parole ineligible. The court of appeals concurred.

The Arizona Supreme Court did not. It ruled that the legislature could change the laws to overrule *Tarango*, but it could not apply it retroactively. Accordingly, the Department of Corrections was ordered to calculate the defendant's parole eligibility date.

Revocation

State v. Rivers, 240 Ariz. Adv. Rep. 28 (1997)

The defendant was placed in a home-arrest, electronic monitoring program during the last phase of his prison sentence. When notified that he had failed drug testing and would have to return to prison, the defendant left his home. He was subsequently arrested and charged with escape. During the trial, the parole officer testified to the operation of the electronic monitoring system, acknowledging that he did not know how it worked from a scientific standpoint. The trial court permitted the testimony. The defendant was found guilty and sentenced. On appeal, the defendant argued the trial court should not have allowed such testimony.

The court of appeals found ". . . no error in the trial court's conclusion that the state provided sufficient foundation and evidence from which the jurors could reasonably conclude that the monitoring equipment was functioning properly when it registered the defendant's curfew violation." The defendant's conviction was affirmed.

Long v. Arizona Board of Pardons and Parole, 177 Ariz. Adv. Rep. 65 (1994) - The Fourteenth Amendment requires an informal hearing for one whose parole is being revoked.

In April, 1992, the defendant successfully completed the Arizona Department of Correction's (ADOC) Shock Incarceration program and was granted community release from prison. Several months later, he tested positive for drugs. He was arrested and returned to prison where he signed a waiver of his probable cause hearing. Although he was scheduled for an Institutional Classification Committee hearing, he did not receive a parole revocation hearing. He filed a complaint with ADOC. When there was no response, he filed a petition for a Writ of Habeas Corpus. When the court granted the Writ, no ADOC representative appeared. Finding that the defendant had not knowingly waived his probable cause or revocation hearing and he was incarcerated without a finding of probable cause, the court ordered ADOC to return him to community release. The state appealed.

The court of appeals, relying upon *Morrissey v. Brewer*, 408 U.S. 471 (1972) noted parole, though not an unqualified liberty, is sufficiently " . . . within the protection of the Fourteenth Amendment to require an informal hearing for one whose parole is being revoked. The hearing requirement serves to assure that any revocation is based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Both a preliminary and revocation hearing are required. The court of appeals did not agree with the state's assertion that an ADOC supervised offender, as an administrative releasee, is not entitled to the same level of process as a parole violator. "The due process requirements outlined in *Morrissey* apply to supervised release by any 'administrative agency,' whether an arm of the court or the executive." Whenever the offender has a qualified liberty interest in remaining on community release, he is entitled to due process. Since the ADOC conditions of supervision indicate that the inmate *may* be returned to an institution if he violates the conditions, "An ADOC supervised offender . . . enters community release with the expectation that the department will exercise discretion over disposition of a violation. And under *Morrissey*, before such discretion is exercised, the offender is entitled to be heard." The court of appeals found that the defendant never waived his right to a revocation hearing.

The court of appeals went on to find that the trial court should not have issued a Writ of Habeas Corpus since it is not the appropriate means to order something less than "absolute discharge." That aside, the court of appeals found a more substantive error. If ADOC erred in not granting the defendant a parole

violation hearing, " . . . the proper remedy was to order such a hearing. To take the further step, jump the hearing, and order community release was to exercise authority that the trial court did not have." The matter was remanded to the trial court to determine if the defendant had been provided a violation hearing. If he had not, the trial court was to handle the matter as a special action and require a hearing.

Plea Agreement

General Principles

Changing a class 6 felony to undesignated permits the state to withdraw from the plea agreement. *State v. Corno*. However, if advised at the change of plea, the defendant may not withdraw if the court changes an undesignated to a class 6 felony. *State v. Diaz*.

Rule 17 of the Arizona Rules of Criminal Procedure establishes the basics of plea negotiations.

Once the court accepts the plea agreement, it may not reject the stipulated offense, but is not required to accept the stipulated sentences. *Williams v. Superior Court.*

In withdrawing from a plea, there is no difference in the rights afforded an Alford or a no contest plea. *Washington v. Superior Court*.

Stipulated jail sentences as conditions of probation may not be modified by the probation officer without the prosecutor's approval. *State v. Rutherford.*

The acceptance of the plea may be deferred until sentencing. *Lambrano v. Superior Court.*

Once the court rejects the plea agreement following a review of the presentence report, the court must disqualify himself/herself upon the request of the defendant. The rule does not make a distinction whether the court accepted the plea or deferred acceptance of the plea. *Chavez v. Superior Court*.

State v. Taylor, 307 Ariz. Adv. Rep. 3 (1999) - The court can accept a deferred plea agreement on the day of sentencing, even when the defendant fails to appear.

The defendant entered into a plea agreement, which the court deferred accepting until the day of sentencing. On that day, the defendant failed to appear. The state moved to have the court accept the plea agreement. The court did so, over the defense counsel's objection. Six years later when the defendant was extradited from Aruba, he moved to withdraw from the plea. The court denied his motion. The defendant appealed, arguing that he had repudiated the plea in two ways: failing to appear and through his attorney's objection to the motion to accept the plea agreement.

The court of appeals found it amusing that the defendant wanted to play by the rules of contract law, when he had not acted in good faith, a basic tenet when employing contract law. The court of appeals went on to note that either party may revoke a plea, but that party must advise the other party and the court that it wishes to do so. Since that did not occur here, the defendant could not now claim that he had rejected the plea agreement. The court of appeals also noted that it would be poor public policy to reward the defendant for absconding for six years, during which time witnesses may have disappeared and memories faded. The trial court's decision to accept the plea agreement was affirmed.

State v. Superior Court (Amacker) of Navajo County, 194 Ariz. Adv. Rep. 24 (1995) - The trial court is not required to review a presentence report before rejecting a plea agreement. An automatic change of judge is not activated when the trial court rejects a plea agreement before submission of a presentence report.

The state and defendant presented a plea agreement to the trial court, which included probation and jail. During the factual basis part of the change-of-plea proceeding, the judge indicated he could not accept the plea agreement which bound the court to probation. Citing *Espinoza v. Martin*, 188 Ariz. Adv. Rep. 70, the defense argued that the court was to utilize its discretion in accepting or rejecting the plea after the presentence report had been prepared. After reviewing that case, the court held that decision supported the court's right to reject the plea agreement without having either a presentence report or the full facts of the case before it by which the state or defendant at that point might then choose to exercise a disqualification of the court. The state and defendant filed a special action, contending the trial court did not give "individualized consideration" before rejecting the plea agreement.

The court of appeals recalled that *Espinoza* held that a "policy of summarily rejecting plea agreements with stipulated sentences violates both rules 17.4 and 36, Arizona Rules of Criminal Procedure." That case guaranteed "the parties the right to present their negotiated agreement to a judge, to have the judge consider the merits of that agreement in light of the circumstances of the case, and to have the judge exercise his or her discretion with regard to the agreement." *Espinoza* disapproved *State v. Bowers*, 173 Ariz. 34, 839 P.2d 454 (App. 1992). The special action in this matter revolves around "individualized consideration". The court of appeals noted that individualized consideration did not necessarily include review of the presentence report and did not want all trial courts to have to review a presentence report in every case before rejecting a plea agreement because of an unacceptable stipulated sentence. The court of appeals held "that *Espinoza* does not require that the trial court review a presentence report before rejecting a plea agreement. We also hold that the Rule 17.4(g) right to an automatic change of judge is not activated when the trial court rejects a plea agreement before submission of a presentence report. *Espinoza* requires that the trial court's rejection of a plea agreement be based on an individualized consideration of the case, and we conclude that the trial court satisfied that requirement." Relief was denied.

State v. Johnson, 185 Ariz. Adv. Rep. 27 (1995)

The court of appeals held that " . . . a court reviewing the extended record to determine the sufficiency of a factual basis for a defendant's plea may consider relevant evidence presented in the record of a codefendant."

Washington v. Superior Court in Maricopa County, 174 Ariz. Adv. Rep. 15 (1994) - There is no difference between Alford and no contest pleas and the standard for withdrawal must be the same.

The defendant entered a no contest plea to leaving the scene of an injury accident. At the sentencing hearing, the defendant was able to produce a missing witness who could exonerate him. The trial court denied the defendant's motion to withdraw from the plea and placed the defendant on probation. The trial court held that there was a fundamental difference between an Alford plea of guilty which is accorded lenient withdrawal standards and a no contest plea. The trial court felt this difference revolved around the defendant maintaining his innocence in an Alford plea and merely refusing to admit guilt in a no contest plea.

The court of appeals accepted jurisdiction and reversed the trial court's ruling. Citing *North Carolina v. Alford*, 400 U.S. 25 (1970), *State v. Stewart*, 131 Ariz. 251 (1982), and *State v. Anderson*, 147 Ariz. 346 (1985); the court of appeals held there is no difference between the two types of pleas and the standard for withdrawal must be the same. The court of appeals felt the "manifest injustice" requirement of Rule 17.5 was satisfied and allowed the defendant to withdraw his no contest plea.

Chavez v. Superior Court in Maricopa County, 174 Ariz Adv. Rep. 34 (1994) - Rule 17.4(g) entitles the defendant to a change of judge if the defendant withdraws from the plea prior to its acceptance pursuant to Rule 17.4(b).

The defendant entered a guilty plea to conspiracy to commit aggravated assault. The trial court deferred acceptance of the plea until sentencing. Following a review of the presentence report, the trial court granted a mitigation hearing, but revoked the defendant's release in light of the report's recommendation. The defendant moved to withdraw from the plea and requested a change of judge. The trial court allowed the defendant to withdraw from the plea, but refused a change of judge, indicating Rule 17.4(g) required a disqualification only if the judge rejects the plea pursuant to Rule 17.4(e). The defendant filed a special action.

The court of appeals accepted jurisdiction and remanded the matter instructing the judge to disqualify himself pursuant to Rule 17.4(g). The court of appeals outlined that Rule 17.4(e) permits a defendant to withdraw a plea agreement if the trial judge rejects the agreement or a provision thereof. Rule 17.4(g) provides that if " . . . a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself . . . " The rule does not distinguish between a withdrawal of plea prior to acceptance under Rule 17.49(b) and a withdrawal of plea following rejection under Rule 17.4(e). Ruling that "the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial" may be prejudiced by examining the information in the presentence report, the court of appeals held that Rule 17.4(g) entitles the defendant to a change of judge if the defendant withdraws from the plea prior to its acceptance pursuant to Rule 17.4(b).

State v. Corno, 168 Ariz. Adv. Rep. 24 (1994) - The trial court can reject the sentencing stipulations of the plea, but in so doing, must allow both parties the opportunity to withdraw from the plea.

The defendant and the state entered a plea agreement in which the defendant would plead guilty to a class 6 felony charge. At the time of sentencing, the court felt the felony designation was too harsh and ordered that the offense should remain undesignated. The state moved to withdraw from the plea agreement. The court denied this motion, indicating that the designation was procedural rather than substantive and was not something that could be included in the bargaining between the state and the defendant.

The court of appeals rejected this premise. Referring to *State v. Diaz*, 173 Ariz. 270 (1992), the court of appeals inferred that the Arizona Supreme Court recognized the parties' right to bargain for the designation of such offenses. The court of appeals went on to note that the trial court could reject the sentencing stipulations of the plea, but in so doing, must allow both parties the opportunity to withdraw from the plea. The case was remanded.

Espinoza v. Martin, Judge, Superior Court in Maricopa County, 188 Ariz. Adv. Rep. 70 (1995) - Maricopa

County's quadrant B policy to accept no plea agreements that contained stipulated sentences was held to violate Rule 17.4 permitting parties to negotiate and reach an agreement on any aspect of the disposition of the case.

Espinoza challenged the adopted policy of the quadrant B judges to accept no plea agreements that contained stipulated sentences. That policy permitted plea agreements that stipulated to probation or DOC, but precluded those that stipulated to any term of years or to any non-mandatory terms and conditions of probation, or to sentences running concurrently or consecutively, except for DOC time followed by lifetime probation in dangerous crimes against children. Judge Martin had summarily rejected Espinoza's plea agreement which stipulated his sentences would be served concurrently. Espinoza filed a special action with the court of appeals which denied relief, holding that the quadrant B policy was a proper exercise of judicial authority. Espinoza filed a petition for review. The Arizona Supreme Court accepted review.

Noting that Rule 17.4 permits parties to negotiate and reach an agreement on any aspect of the disposition of the case, the Arizona Supreme Court felt that to " . . . ensure that agreements negotiated pursuant to rule 17.4 have some meaningful effect, we interpret rule 17.4 as guaranteeing the parties the right to present their negotiated agreements to a judge, to have the judge consider the merits of that agreement in light of the circumstances of the case, and to have the judge exercise his or her discretion with regard to the agreement . . . Because the quadrant B policy simultaneously limits the content of plea agreements and precludes the exercise of judicial discretion over individual plea agreements, we hold that the policy violates rule 17.4." The Arizona Supreme Court went on to note that " . . . the quadrant B policy violates rule 36, Arizona Rules of Criminal Procedure, because quadrant B adopted a rule that is inconsistent with the Arizona Rules of Criminal Procedure. Even if the quadrant B policy were consistent with the rule of procedure, the policy constituted a local rule that was invalid because quadrant B adopted it without first obtaining the approval of this court. This court has the exclusive power to make rules pertaining to all procedural matters in an Arizona court." The Arizona Supreme Court went on to take exception to Judge Martin's contention that the quadrant B policy was an "experiment". Even if it were an experiment, "the judges are still subject to the provisions of rule 36.

Justice Martone dissented with Justice Zlaket dissenting in part. Justice Martone felt the policy conformed to rule 17.4 and was a creative way to improve the criminal justice system. He did not believe the Arizona Supreme Court has "been at the forefront of reform in the criminal justice system." Justice Zlaket felt the policy was an unapproved local rule, but felt judges "should be able to summarily reject (plea agreements) containing stipulated sentences for that reason alone, without having to go through the charade of considering each case individually."

Espinoza v. Superior Court in Maricopa County, 154 Ariz. Adv. Rep. 56 (1993) - Vacated by Arizona Supreme Court in 188 Ariz. Adv. Rep. 70.

The defendant appealed the policy established by Quadrant B of the superior court which allowed that plea agreements could only stipulate to probation, jail, or the department of corrections and precluded the attorneys from stipulating to terms of years or conditions of probation. The court of appeals, citing the Silverman report on the criminal justice system in Arizona in which it was likened to " . . . a middle eastern marketplace than a thoughtful system for determining the truth" denied the defendant's appeal. The court held " . . . that the policy of declining plea bargains containing sentencing stipulations is a proper exercise of that judicial authority which resides at the heart of what Sir Edward Coke long ago called 'the gladsome light of

jurisprudence"'.

State v. Sanchez, 132 Ariz. Adv. Rep. 11 (1993)

The defendant pled guilty to attempted conspiracy to sell narcotic drugs with a prior conviction, a class three felony. On appeal, the court found there was no cognizable offense under Arizona law as "attempted conspiracy." The conviction was reversed.

State v. Diaz, 128 Ariz. Adv. Rep. 28 (1993) - The court does not have to allow a defendant to withdraw from a plea agreement in which the court designates an undesignated offense as a felony.

The defendant entered a plea to possession of marijuana, a class six undesignated offense. At the time the plea was accepted, the defendant was advised that it could be treated as a misdemeanor or a felony at the court's discretion. At sentencing the court designated the offense a felony. The defendant moved to withdraw from the plea. The court denied the motion to withdraw and sentenced the defendant to three years probation and one year jail. The defendant appealed the felony designation. The court of appeals reversed, holding that the trial court abused its discretion in not allowing the defendant to withdraw his plea. The state requested a review by the Arizona Supreme Court.

The Arizona Supreme Court upheld the trial court's original finding. It noted first that A.R.S. § 13-702(H) allows the court to provide a felony designation for a class six, undesignated offense at the time of sentencing. Secondly, the plea agreement did not preclude the trial court from doing such. Accordingly, it found that the trial court did not have to allow the defendant to withdraw from the plea.

State v. Rutherford, 744 P.2d 13 (1987)

Terms of the plea agreement, in this case one year (flat) in jail, may not be later modified by the probation officer or court without all parties' consent including the state's.

State v. Caperon, 728 P.2d 296 (1986)

The court may reject the terms of a plea agreement.

State v. Stewart, 640 P.2d 182 (1982) - See *Washington v. Superior Court in Maricopa County*, 174 Ariz. Adv. Rep. 15 (1994)

There is no significant difference between plea of guilty with a protestation of innocence (Alford) and a plea of no contest.

Williams v. Superior Court, 635 P.2d 497 (1981)

Once the court accepts the plea agreement, it may not reject it unless the defendant agrees, even after the defendant absconds before sentencing. However, the court does not have to accept the stipulated sentence.

Smith v. Superior Court, 635 P.2d 498 (1981)

Having accepted the defendant's plea agreement, the court is not bound by the stipulated sentence. The court may refuse to accept that stipulation and allow the defendant to withdraw from the plea agreement.

Lambrano v. Superior Court, 606 P.2d 15 (1980)

The acceptance of a plea may be deferred until the time of entry of judgment.

State v. Freda, 590 P.2d 1376 (1979)

In order to enter an Alford plea only two findings are necessary: (1) a strong factual basis of the plea and (2) the defendant's voluntary desire to enter the plea despite professed innocence. Arizona does not feel that defendant must also receive a substantial benefit (see *North Carolina v. Alford*).

North Carolina v. Alford, 400 US 25 (1970)

The courts may accept a voluntary and intelligent plea of guilty by a defendant who disclaims guilt, but accepts a plea since the case is such that the evidence is overwhelming and the defendant chooses to avoid a harsher penalty.

Post-Conviction Relief (PCR)

Montgomery v. Sheldon, Judge, Superior Court in Maricopa County, 187 Ariz. Adv. Rep 3 (1995) - The court of appeals can summarily deny review of petitions that the trial court correctly denied and also look for fundamental error.

The Arizona Supreme Court was asked to determine: 1) if the court of appeals is required to search the record for fundamental error which would conflict with Rule 32.9 (c)(1)(ii); and 2) if such a search for fundamental error is required, does this then require mandatory review of all petitions. The Arizona Supreme Court noted that a guilty plea is guaranteed a right to appellate review. "Recent rule changes, however, do provide that a defendant pleading guilty waives any direct appeal. Ariz.R.Crim.P. 17.1. Presently then, appellate review for such a defendant is by Rule 32, a much narrower avenue. Thus, because a Rule 32 proceeding is the appeal for a defendant pleading guilty, A.R.S. § 13-4035 requires the court of appeals to search for fundamental error." This conforms with Rule 32, which directs a petitioner to specify those issues the court is asked to review. However, nothing precludes the court of appeals from examining the record before it for fundamental error. "Searching for fundamental error is not a burdensome requirement." Nor does it require mandatory review under Rule 32. "We do not require the court of appeals to grant a defendant's petition for review before searching the record for fundamental error . . . the court of appeals . . . can summarily deny review of petitions that the trial court correctly denied and also look for fundamental error . . . The court of appeals is well able to look for fundament error at the same time that it considers whether to accept the petition for further analysis. The court must simply state in any order denying review that it has examined the record and found no fundamental error. The court need not perfunctorily grant review and deny relief to search for fundamental error. Nor must it file a memorandum decision."

By adopting this procedure, the Arizona Supreme Court felt that it was expediting post-conviction proceedings while at the same time preserving constitutional protections. The rule eliminates direct appeals by pleading defendants and preserves the constitutionally guaranteed right of appellate review.

Justice Martone dissented. He stated that a review for fundamental error was incompatible with the rule and discretionary review. He questioned how the court of appeals can " . . . summarily deny review and look for fundamental error at the same time."

Krone v. Hotham, Judge, Superior Court in Maricopa County, 185 Ariz. Adv. Rep. 13 (1995)

The defendant was convicted of first degree murder and sentenced to death. His conviction and sentence were automatically appealed to the Arizona Supreme Court. While his direct appeal was pending, the defendant filed a notice of post-conviction relief pursuant to Rule 32. The trial court dismissed the notice holding it was premature under Rule 32.4(a). In its ruling, the trial court held the rule precluded filing for post-conviction relief before his direct appeal was concluded.

The Arizona Supreme Court accepted the request for special action. It held " . . . that Rule 32.4(a) does not preclude a defendant under sentence of death from filing a notice of post-conviction relief before his direct appeal is concluded." In holding such, the Arizona Supreme Court was aware " . . . that our present practice may appear to conflict with the practice suggested by cases starting with *State v. Valdez*, 160 Ariz. 9 (1989) . . . [h]owever, the practice of staying appeals pending resolution of Rule 32 proceedings has proven unsuccessful, and we will no longer engage in it, barring the most exceptional circumstances."

State v. Jones, 189 Ariz. Adv. Rep. 49 (1995)

In a special action, the court of appeals held petitions for post-conviction relief in non-capital cases may be filed anytime prior to issuance of a mandate from the appellate court.

Prior Crimes/Convictions

State v. Hickman, 295 Ariz. Adv. Rep. 16 (1999)

The state provided copies of two orders revoking the defendant's Montana probations in an attempt to prove his predicate felony. The court of appeals reversed the sentence because the state's evidence did not provide the dates the defendant committed the felonies, thus there was no way the court could determine if they had been committed within five years of the present offense.

State v. Garcia, 243 Ariz. Adv. Rep. 46, (1997) - Historical prior felony convictions must be counted in chronological order from the earliest to determine any third or more prior felony conviction.

The court of appeals held that applying subsection 13-604.U.1(d) only to felony convictions that are chronologically the third or more in time is consistent both with the statute's purpose of punishing defendants with multiple prior felony convictions more harshly than other defendants and with the purpose of establishing a relationship between time of prior offense and its use to enhance a sentence. Historical prior felony convictions must be counted in chronological order from the earliest to determine "any third or more prior felony conviction."

State v. Terrazas, 215 Ariz. Adv. Rep. 45 (1996)

The court of appeals concluded that in proving a prior crime, the proper level of evidence is preponderance rather than that needed to take the question to a jury.

State v. Tarango, 214 Ariz. Adv. Rep. 38 (1994)

The Arizona Supreme Court resolved the differing court of appeals' opinions in *State v. Tarango*, 182 Ariz. 246 (App. 1994) and *State v. Behl*, 160 Ariz. 527 (App. 1989) concerning whether the imposition of A.R.S. § 13-604(D) preempts other sentencing statutes. Tarango was convicted of drug sales and two prior convictions. The applicable drug statute A.R.S. § 13-3408(B) required the defendant to serve the entire 15.75 years imposed by the court. However, the repetitive statute, A.R.S. § 13-604(K), allowed the defendant to serve two-thirds of her sentence. Since the court used A.R.S. § 13-3408 mandating no parole, the defendant appealed. The court of appeals upheld the defendant's argument that she was eligible for parole after serving two-thirds of her sentence. In a four-to-one decision, the Arizona Supreme Court upheld this opinion. Justice Martone concurred with the *State v. Behl* decision.

State v. Anderson, 210 Ariz. Adv. Rep. 25 (1996)

The defendant was charged with shoplifting liquor worth $90.00, a class 4 felony as a result of two

prior shoplifting convictions in the past five years. He was sentenced to prison. The defendant appealed, arguing that during his previous misdemeanor convictions, he had not been advised of his right to counsel. The court of appeals agreed noting ". . . this has been the law in Arizona since at least 1968, and we reject the state's argument that a recent U.S. Supreme Court opinion requires a change in Arizona law." The conviction as a class 1 misdemeanor was affirmed. The case was remanded for resentencing.

State v. Tarango, 178 Ariz. Adv. Rep. 27 (1994) - See ***State v. Tarango***, 214 Ariz. Adv. Rep. 38 (1994)

The defendant was convicted of drug sales and two prior convictions. The applicable drug statute A.R.S. § 13-3408 (B) required the defendant to serve the entire 15.75 years imposed by the court. However, the repetitive statute, A.R.S. § 13-604(K), allowed the defendant to serve two-thirds of her sentence. Since the court used A.R.S. § 13-3408 mandating no parole, the defendant appealed.

The court of appeals upheld the defendant's argument that she was eligible for parole after serving two-thirds of her sentence. It relied upon language in A.R.S. § 13-604(K) which stated " . . . [t]he penalties prescribed by this section shall be substituted for penalties otherwise authorized by law . . ." In reaching this conclusion, the court of appeals recognized it was departing from *State v. Behl*, 160 Ariz. 527 (1989). However, the court felt the statute's language was plain and unambiguous and no construction of it was necessary.

State v. Fagnant, 150 Ariz. Adv. Rep. 3 (1993)

In a ruling similar to *State v. Song*, 149 Ariz. Adv. Rep 3 (1993), the Arizona Supreme Court ruled that since the determination of whether a "prior felony conviction committed outside Arizona would be considered a felony if committed in Arizona" is a legal issue, it must first be raised in the trial court. A defendant may not bring it to the court of appeals without first having raised the issue at the trial court. The Arizona Supreme Court vacated the court of appeal's decision in *State v. Fagnant*, 105 Ariz. Adv. Rep. 33 (1992).

State v. Decker, 117 Ariz. Adv. Rep.16 (1992)

At the defendant's sentencing for burglary and theft, the court used the defendant's 1978 Iowa misdemeanor conviction to enhance the sentence. While the misdemeanor would have been considered a felony in Arizona in 1978, the court of appeals noted that the enhancement statutes A.R.S. § 13-604(A-G) require that the enhancement be imposed if the defendant "has previously been convicted of any felony . . . This statement does not say 'convicted of an offense which, *if committed in this state, would have been punishable as a felony* [emphasis added].'" The court of appeals reversed the aggravated sentences and remanded the case for resentencing.

State v. Levitt, 747 P.2d 607 (1987)

The defendant's prior juvenile adjudications may be considered in determining an appropriate

disposition. The juvenile court may release all information in its possession when requested for a presentence investigation (A.R.S. § 8-208).

State v. Winton, 736 P.2d 386 (1987)

The court has authority to designate undesignated offenses as felonies at the time of probation revocation and may be used as a prior felony conviction.

State v. Fierson, 705 P.2d 1338 (1985)

A prior conviction may be used to impeach despite restoration of civil rights.

Probation Conditions

General Principles

Rule 27.1 of the Arizona Rules of Criminal Procedures provides that the court may impose on the defendant such conditions as to promote rehabilitation. It also requires that all conditions and regulations of probation be in writing and a copy given to the defendant.

Probation is a matter of legislative grace. It is a sentencing alternative which a court may use in its sound judicial discretion when the rehabilitation of the defendant may be accomplished with restrictive freedom rather than imprisonment. The court may surround probation with restrictions and requirements which a defendant must follow to retain his probationary status." *State v. Smith*.

Unless the conditions of probation are such that they violate fundamental rights or bear no reasonable relationship to the purposes of probation over incarceration, the appellate courts will not interfere with the trial court's exercise of discretion in the formulation of the terms and conditions of probation. *State v. Cummings*, *State v. Davis*, and *State v. Smith*.

The court may require that a defendant comply with numerous conditions of probation when, in the opinion of the court, such conditions aid in the rehabilitation process or prove a reasonable alternative to incarceration as punishment for the crime committed. The defendant, of course, may reject the terms of probation and ask to be incarcerated instead if he finds the terms and conditions of his probation unduly harsh. Unless the terms of probation are such as to violate basic fundamental rights or bear no relationship whatever to the purpose of probation over incarceration, the appellate court will not disturb the trial court in the exercise of its discretion in imposing conditions of probation. *State v. Montgomery*.

The proper time to object to a condition of probation is when it is imposed, otherwise the defendant waives his right to object to the condition through an appeal. *State v. Mears*, *State v. Cummings*, and *State v, Montgomery*.

The discretionary power given the sentencing court to impose, modify, or revoke probation is limited by several statutory provisions, as well as constitutional due process considerations." *Green v. Superior Court*.

The Court may order as conditions probation that a probationer: not see his or her spouse without permission, *State v. Nickerson*; not enter the United States illegally, *State v. Marquez-Sosa*; not associate with past friends, *State v. Hennessy*; pay for cost of incarceration, *State v. Smith*; pay extradition costs, *State v. Balsam*; sell his house as the defendant had agreed to pay restitution, *State v. Smith*; submit to a warrantless search by probation officers, *State v. Turner* and *State v. Jeffers*; and submit to polygraph, *State v. Graville*.

Directives by the probation officer must be in writing. *State v. Robinson* and *State v. Jones*

The court may not order as a condition of probation that the defendant be required to incriminate himself. *State v. Eccles*.

The court may not impose state criminal laws upon the behavior and activities of Native Americans living on the Indian reservation through probation conditions. *Begay v. Superior Court*.

The condition of probation limiting contact with children must provide specific language regarding contact to avoid penalizing the defendant's "innocent presence with other people." *State v. Martin*.

Jail, as a condition of probation, can be imposed on defendants subject to Proposition 200. *Calik v. Superior Court in Yuma County*

Calik v. Superior Court in Yuma County, 254 Ariz. Adv. Rep. 22 (1997) - A.R.S. §§ 13-901 and 13-901.01 permit incarceration in jail as a condition of probation and that the effect is consistent with the language and policies of Proposition 200.

The defendant pled guilty to possession of methamphetamine. Since the defendant had no prior criminal history, the court placed him on probation in accordance with A.R.S. § 13-901.01. Additionally, the court determined that it could impose incarceration in the county jail as a condition of probation. Prior to sentencing, the defendant requested and was granted a stay in order to file a special action, arguing that Proposition 200 precluded incarceration.

The court of appeals noted that Proposition 200 requires the court to suspend sentencing and impose probation and treatment. "However, Proposition 200 did not address whether courts, acting under section 13-901.01, can impose conditions of probation other than those specified in the proposition." Directions for this must be obtained from later legislative intent.

Senate Bill 1373 enacted A.R.S. § 31-3422 which authorized counties to establish "drug courts." As part of the drug court, a defendant could be ordered incarcerated in a county jail not to exceed a year. Senate Bill 1373 also amended A.R.S. § 13-901 to include the following provision:

> If the defendant meets the criteria set forth in section 13-901.01 or 13-3422, the court may place the defendant on probation pursuant to either section. If a defendant is placed on probation pursuant to section 13-901.01 or 13-3422, the court may impose any term of probation authorized by this section.

A.R.S. § 13-901(F) authorizes incarceration as a condition of probation, as long as the period actually spent in confinement does not exceed one year or the maximum period of imprisonment, whichever is shorter.

The court of appeals went on to note that Proposition 200 spoke solely in terms of prison sentences, but nowhere referred to jail as a condition of probation.

> Nothing in the language of section 13-901.01 pertaining to initial probation terms suggest any intent

> to divest courts of their long-standing authority to impose incarceration in jail as a condition of probation . . . We conclude that the combined effect of A.R.S. § sections 13-901 and 13-901.01 is to permit incarceration in jail as a condition of probation and that the effect is consistent with the language and policies of Proposition 200.

State v. Jimenez, 188 Ariz. 342, 935 P.2d 920 (1996) - Defendants who plead guilty cannot appeal their case by applying to modify the conditions of probation.

The defendant pled guilty to unlawful use of means of transportation, a class 1 misdemeanor, and was granted probation. Based upon information contained in the presentence report, the court imposed sex offender probation conditions that included sex offender registration and DNA testing.

Shortly after sentencing, the defendant filed a motion to modify the conditions to delete sex registration and DNA testing. He argued they were improper because he was not convicted of any sexual offense. The court granted his motion and deleted those two conditions.

Several weeks later, the defendant filed another motion to delete all the sex offender conditions. The court denied this motion. The defendant appealed.

The state argued the defendant had no standing to bring the issue to the court of appeals since he had entered a plea and did not have a right to a direct appeal, but rather had to seek review through Rule 32, Arizona Rules of Criminal Procedures. The court of appeals agreed and dismissed the matter.

Since 1992, pursuant to A.R.S. §13-4033(B) and Rules 17.1(e), 17.2(e), and 27.8(e), defendants who plea guilty or admit probation violation cannot pursue a direct appeal. In this matter, the defendant ". . . cannot bestow on himself the right of direct appeal by simply filing a 'motion to modify' conditions of probation which were imposed at the time of sentencing . . . The trial court's order denying defendant's motion to modify the terms of probation is not an order affecting the substantial rights of defendant. If the trial court's order had actually changed or modified the judgment or sentence originally imposed, we assume defendant would have had the right of direct appeal." See *Arvizu v. Fernandez*, 183 Ariz. 224 (App. 1995).

Maricopa County Juvenile Action No. JV-511237, 221 Ariz. Adv. Rep. 42 (1996) - HIV testing can only be imposed as a condition of probation when requested by the victim.

The fourteen-year-old juvenile was granted probation after being adjudicated delinquent for rubbing his five-year-old brother's penis while they watched an x-rated video. As special conditions of probation, the juvenile was ordered to: submit to HIV testing, not possess any sexually stimulating material or patronize any place where such material is available, and wear undergarments and clothing in situations where another person may see him. The juvenile appealed these conditions.

Although the court of appeals confirmed that the juvenile court had a right to impose the HIV testing because the juvenile had admitted to other acts that would have exposed the victim to his bodily fluids, it denied the imposition of this condition because A.R.S. § 8-241(N) specifically allows HIV testing *only on the request of the victim.* The victim did not request such testing in this matter.

The court of appeals next held that the "patronizing" condition was too broad and vague. It precluded the juvenile from visiting convenience markets where *Playboy* might be sold. The court of appeals upheld the condition regarding the juvenile's clothing. It held that this condition merely required the juvenile to be properly clothed in the presence of others. The conditions involving HIV testing and patronizing were

vacated.

State v. Superior Court in Maricopa County (JV511263), 221 Ariz. Adv. Rep. 30 (1996) - The court can order HIV-testing when requested by the victim.

The juvenile in this matter was adjudicated delinquent for child molestation after attempting anal intercourse with the victim. The victim's mother requested HIV-testing as provided in A.R.S. § 8-241 (N). The juvenile court denied this request finding involuntary HIV-testing to be an unreasonable search under the Fourth Amendment. The state filed a special action.

The court of appeals held:

> . . . on the facts presented in this case, we find that the juvenile offender's privacy interest in resisting HIV testing is substantially outweighed by the government's interest in assisting victims of sexual offenses to discover whether they have been exposed to HIV. We further conclude that A.R.S. § 8-241(N) bears an adequately close and substantial relationship to the goal of helping victims to warrant deference from the courts.

The court of appeals went on to hold that the statute was not overly broad and did not violate A.R.S. § 36-665(A). The order finding the statute unconstitutional was vacated and the case remanded for further proceedings consistent with this decision.

State v. Arzola, 196 Ariz. Adv. Rep. 24 (1995) - The DUI statute requires the four-month imprisonment to be served immediately after sentencing, and the trial judge should not have delayed it in this case.

The defendant pled guilty to aggravated driving under the influence of alcohol with a blood alcohol content of .10 percent or more, a class four felony. The court placed the defendant on probation and ordered him to serve four months in the Department of Corrections to begin two months later. The state appealed arguing that A.R.S. § 28-697 (E) requires a defendant to begin the period of incarceration at the time of sentencing.

The court of appeals concurred with the state. "Section 28-697(E) makes it clear . . . that a defendant convicted of aggravated DUI is not eligible for any sort of release until he has served at least four months in prison. Thus, the statute requires the four-month imprisonment to be served immediately after sentencing, and the trial judge should not have delayed it in this case."

State v. Eccles, 179 Ariz. 226, 877 P.2d 799 (1994) - The State may validly insist on answers to even incriminating questions to administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination.

The defendant was convicted of two counts of child molestation. In one count, he received a prison sentence. In the other count, he was granted probation. As a condition of that probation, the sentencing court told the defendant he must agree to:

> "waive any and all rights against (self-incrimination), granted under the United States

and/or the State of Arizona constitutions, by answering truthfully, any questions that the probation officer, counselors, polygraph examiners, or any other agent of the Probation Department's treatment programs -- whether the question concerns the offense for which you are on probation, or for any other event of sexual contact, whether charged or uncharged -- any answers you give may be used, not only in treatment, but also in the -- if the offense is not previously known to the State -- as evidence to revoke your conditions of probation, or for the filing of new charges, and at trial, on those new charges. Refusal to follow any of these instructions would be a violation of your conditions of probation, and can result in a revocation of probation and imposition of a prison sentence."

The defendant appealed, arguing the trial court and appellate court could not impose a condition that required him to incriminate himself. The Arizona Supreme Court concurred with the defendant. Citing the U.S. Supreme Court's decision in *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136 (1984), the Arizona Supreme Court held that not only is the state prohibited from revoking probation for a legitimate invocation of the privilege against self-incrimination, but also prohibited from making waiver of the privilege a condition of probation. The state may not force the defendant to choose between incriminating himself and losing his probationary status by remaining silent. Accordingly the Arizona Supreme Court "sanitized" the condition to read: "defendant must agree to answer truthfully, any questions (asked by) the probation officer, counselors, polygraph examiners, or any other agent of the Probation Department's treatment programs."

This sanitized condition requires the defendant to respond truthfully to questions that could not incriminate him in future criminal proceedings but would not prohibit him from validly asserting the privilege against self incrimination and would not penalize him for so doing. The Supreme Court went on to note it did not hold that the defendant may not incriminate himself, but " . . . to avoid doing so, he must assert the privilege at the appropriate time." The Arizona Supreme Court recognized that by asserting the privilege, the defendant may be refusing to disclose conduct which constitutes both a probation violation and a new criminal offense. Relying on *Murphy*, the Arizona Supreme Court indicated " . . . a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." The state may compel an answer to an incriminating question only if it offers the probationer use immunity. *Murphy* also held that a probation revocation proceeding is not a criminal proceeding.

Begay v. Superior Court in Navajo County, 172 Ariz. Adv. Rep. 31 (1994) - The jurisdiction and authority of the Arizona state courts do not extend to the actions of Native Americans on a reservation.

Begay, a Navajo who lived on the reservation, was placed on probation for one year following his plea to theft, a class 1 misdemeanor. As one of the conditions of probation, the trial court ordered that Begay " . . . not cohabitate with any person if married unless legally married." The trial court was aware that Begay lived with a Navajo woman who was not his wife and their two children. The judge told Begay: "The Court feels like while you are on probation you should not be living in violation of the law, and one of the conditions that you have violated is living with a person with whom you're not been married, I don't believe you should do that and be on probation. It's called open and notorious cohabitation under the statute, and it's a misdemeanor . . ." Begay objected and filed for a reconsideration, which was denied. He subsequently filed a special action with the court of appeals.

The court of appeals held that the jurisdiction and authority of the Arizona state courts do not extend to the actions of Native Americans on a reservation. The court of appeals noted that several states have assumed complete civil and criminal jurisdiction over tribal lands, but Arizona had not, except for enforcing air pollution control laws. Consequently, the state does not have jurisdiction " . . . to enforce its criminal or other laws against Native Americans living on Indian lands." *Francisco v. State*, 113 Ariz. 427 (1976). The fact that Begay was on probation for a crime committed within the jurisdiction of the Arizona courts was of no import in this context. The state may not regulate the behavior of a Native American by superimposing state criminal law upon his activities on the Indian reservation. The court of appeals went on to note that a Native American may not confer jurisdiction upon the Arizona courts by agreement. Accordingly, the court of appeals found that the trial judge had exceeded his authority and voided that condition of probation.

State v. Hershberger, 178 Ariz. Adv. Rep. 3 (1994) - No statute, rule, or decision requires the court to advise a defendant of all the conditions of probation which may be imposed as a result of a guilty plea.

The defendant pled guilty to two charges of indecent exposure. He was granted probation and ordered to register as a sex offender and participate in intensive sex offender therapy. The defendant filed a Petition for Post-Conviction Relief which was denied. He then appealed asking that his plea and sentence be set aside.

The defendant offered two bases for his appeal. In the first, he contended the trial court did not sufficiently inform him that the conditions of probation would require such intense therapy or that he could not live with his minor brother. The court of appeals noted Ariz. R. Crim. P. 17.2 (b) and *State v. Young*, 112 Ariz. 361 (1975) require the defendant to be advised of any "special conditions regarding sentence, parole, or commutation imposed by statute." In this instance, there were none. "No statute, rule, or decision requires the court to advise a defendant of all the conditions of probation which may be imposed as a result of a guilty plea."

The defendant's second issue involved his requirement to register as a sex offender for life. The defendant maintained that his attorney provided ineffective counsel by telling him that this requirement might be dropped after a year. The defendant also claimed his attorney coached him how to lie to the judge to get him to accept the plea. Relying upon *Blackledge v. Allison*, 431 U.S. 63 (1977), the court of appeals held that these last two aspects of the defendants's claim merited a hearing. For that reason, the case was remanded.

State v. Robinson, 160 Ariz. Adv. Rep. 5 (1994) - All conditions and directives must be committed to writing if a probation violation is to be sustained.

The defendant's probation officer orally directed the defendant to participate in a domestic violence program. When the defendant failed to do so, the officer filed a petition to revoke probation. At the violation hearing, the defendant admitted he failed to participate in the program despite his officer's oral directive. The defendant's probation was reinstated with six months in jail. On appeal, the court of appeals discouraged the practice of issuing oral directives but upheld the violation because the defendant in open court admitted receiving the directive. The matter was appealed to the Arizona Supreme Court.

In a four to one opinion, the Arizona Supreme Court reversed the court of appeal's decision, vacated the probation violation, and remanded the case to the trial court. The Arizona Supreme Court soundly rejected the state's contention that the general conditions signed by the trial court sufficiently complied with

Rule 27.7(c)(2). This rule states in part ". . . Probation shall not be revoked for violation or regulation of which the probationer has not received a written copy." Equally important, the Arizona Supreme Court ruled that even if the defendant admits that he was instructed by the officer verbally, it is insufficient to uphold a violation if the condition had not been provided in writing. According to the Arizona Supreme Court, all conditions must be committed to writing if a probation violation is to be sustained.

The Arizona Supreme Court went on to say that it did not find providing such written notice to be an "onerous requirement." It suggested that in the case at hand, once the officer became aware that the defendant had not complied with the condition, the officer " . . . could have simply written out his order and given it to the probationer. Then, if the probationer further refused . . . , the probationer would be subject to probation revocation." The Arizona Supreme Court continued by noting oral notice might lead to unfair results. The honest probationer would admit to violating an oral directive and have his probation revoked. A less than honest probationer would deny that the officer had given him a verbal directive and could not have his probation revoked.

State v. Martin, 109 Ariz. Adv. Rep. 74 (1992) - A condition to have no contact with children under the age of eighteen years without specific written permission of the supervising probation officer is too vague.

The defendant was placed on lifetime probation for attempted molestation of a child and as a special condition of probation (#20), the defendant was ordered to " . . . have no contact with children under the age of eighteen years without specific written permission of the supervising probation officer." A petition to revoke was issued alleging violations of conditions 1, 4, and 20. Following a violation hearing, the court found the defendant in violation of conditions 1 & 20 and dismissed the condition 4 allegation. Probation was revoked and the defendant was sentenced to five years in the Department of Corrections. On appeal, the defendant argued the trial court erred in finding him in violation of the special condition #20. During the revocation hearing, the defendant had admitted that his brother, girlfriend, and two children under eighteen came to his foster home for dinner. The defendant was never alone with the children. There was no evidence of physical or verbal contact with the children nor any improper behavior on the defendant's part.

The court of appeals found this was insufficient evidence to support a violation of condition #20. The word "contact" was construed to be " . . . so vague as to fail to provide Martin with notice about what kind of group association is prohibited." While intended to prohibit potential sexual contact with minors, the language is so broad to also prohibit from merely being present with minors in shopping malls, churches or other social events. "More qualified language is needed regarding 'contact' to avoid penalizing such innocent physical presence with other human beings." The violation was set aside. In accordance with *State v. Ojeda*, 159 Ariz. 560, the case was remanded for a new disposition.

State v. Nickerson, 791 P.2d 647 (1990)

A probation condition which ordered that the defendant could not see his wife without the consent of his probation officer, except when they were in joint counseling, was a reasonable condition.

State v. Marquez-Sosa, 779 P.2d 815 (1989)

The court may order as a condition of probation that the defendant refrain from remaining in or entering the U.S. illegally.

State v. Clements, 776 P.2d 801 (1989)

In DUI class 5 felony cases which require as a condition of probation six months in Department of Corrections, the court may give the defendant credit for presentence custody time. It is, however, a discretion of the court, not every case will be given credit.

State v. Jurado, 755 P.2d 1203 (1988)

The court may revoke an illegal alien's probation for illegally reentering the U.S. The state may not require defendant to agree to deportation as a condition of probation -- only federal policy may determine such.

State v. Cory, 749 P.2d 937 (1988)

Although defendant pled guilty to attempted sexual assault, he is required to register as a sex offender. A condition of probation as such is appropriate.

State v. Perkins, 767 P.2d 729 (1988)

Defendants do not need to be advised at change of plea of possibility of intensive probation. Intensive Probation Supervision is considered within the confines of probation when a plea is entered.

State v. Graville, 728 P.2d 561 (Oregon 1986)

Submission to polygraph may be included as a condition of probation if necessary to accomplish purpose of probation.

State v. Turner, *142 Ariz. 138* (Ariz. App. 1984)

The defendant appealed the "warrantless search" condition of probation by probation officers. The court of appeals relied upon *Consuelo-Gonzalez*:

> Probation, however, has law enforcement aspects. Because of this, conditions which serve to protect the public from recidivism by the probationer or to deter others by way of example are not contrary to the purposes of the Act so long as all the conditions construed together serve substantially the purpose of rehabilitation.

The court of appeals went on to address the defendant's contention that the regulation imposed by

the probation officer was not the equivalent of a condition of probation unless the sentencing judge has specifically included the regulation within his order, and that a probation officer may not authorize the suspension of one's constitutional rights without judicial approval.

Noting that the 7th condition of probation indicated that the defendant shall carry out the regulations of the probation officer, including warrantless search, the court of appeals held this was a condition of probation.

> The probation officer then gives the defendant a standard set of special regulations, explains them, and asks the defendant to sign a statement that he understands the conditions and regulations and the possible consequences of a violation and that he agrees to abide by the terms of his probation . . . The court sets out the broad outlines and the probation officer fills in the details . . . Thus, all the conditions on the form are to be considered as having been imposed by the court regardless of whether each provision was specifically stated on the record by the judge.

State v. Mears, *134 Ariz. 95* (Ariz. App. 1982) - The proper time to object to a term of probation is at the time it is imposed.

The defendant was ordered to pay restitution and a probation service fee. He appealed. The court of appeals noted that the defendant did not object to the conditions when they were imposed. "The proper time to object to a term of probation is at the time it is imposed. To wait to object is to deprive the trial court of an opportunity to consider alternatives in sentencing and to foreclose the trial court from correcting any alleged errors." *State v. Smith, 129 Ariz. 28*.

State v. Smith, *129 Ariz. 28* (Ariz. App. 1981) - The condition to sell his house was a proper condition since the defendant did not object at the time of sentencing.

The defendant agreed during presentence interview to sell his house to pay restitution. The trial court imposed a special condition that the defendant waive his right to "homestead" his home, precluding the sale of it to pay restitution. After sentencing, the defendant appealed, contending the court did not have the right to force him to waive his "homestead" right.

The appellate court relied upon the fundamental principle that unless the terms of probation are such that they violate fundamental rights or bear no reasonable relationship to the purposes of probation over incarceration, the appellate courts will not interfere with the trial court's exercise of discretion in the formulation of the terms and conditions of probation. *State v. Cummings, 120 Ariz. 69* (App. 1978); *State v. Davis, 119 Ariz. 140* (App. 1978). The appellate court also held that the defendant waived his right to object to the trial court's imposition of the homestead waiver condition by not objecting when the condition was imposed. *State v. Cummings*; *State v. Montgomery, 115 Ariz. 583* (1977).

State v. Balsam, 130 Ariz. 452 (Ariz. App. 1981) - Paying extradition costs is an appropriate condition of probation.

The defendant objected to a condition of probation ordering him to pay extradition costs. The court of appeals felt paying extradition costs may serve a useful purpose in his rehabilitation. *State v. Cummings, 120 Ariz. 69* (App. 1978); *State v. Montgomery, 115 Ariz. 583* (1977). "We note parenthetically that appellant did not object below to the conditions of probation. He could have rejected the terms of probation if he found them too harsh and asked to be incarcerated instead."

State v. Hennessy, 470 P.2d 194 (1981)

Probation is calculated to aid defendant in rehabilitation. The court may set reasonable conditions to quarantine defendant from old crowd and others with demonstrated propensity toward lawlessness in an effort to maintain jurisdiction and power over defendant.

State v. Smith, *118 Ariz. 345* (Ariz. App. 1978)

The defendant was ordered to pay for the cost of his incarceration as a condition of his probation. He appealed. The appellate court relied upon *State v. Smith, 112 Ariz. 416* (1975) in which the Arizona Supreme Court stated:

> Probation is a matter of legislative grace. It is a sentencing alternative which a court may use in its sound judicial discretion when the rehabilitation of the defendant can be accomplished with restrictive freedom rather than imprisonment. The court can surround probation with restrictions and requirements which a defendant must follow to retain his probationary status.

The discretion afforded courts to determine and impose conditions of probation has been described in very broad terms:

> [T]he court may require that a defendant comply with numerous conditions of probation when, in the opinion of the court, such conditions aid in the rehabilitation process or prove a reasonable alternative to incarceration as punishment for the crime committed. The defendant, of course, may reject the terms of probation and ask to be incarcerated instead if he finds the terms and conditions of his probation unduly harsh. Unless the terms of probation are such as to violate basic fundamental rights or bear no relationship whatever to the purpose of probation over incarceration, we will not disturb the trial court in the exercise of its discretion in imposing conditions of probation. *State v. Montgomery, 115 Ariz. 583.*

The court of appeals upheld the condition of probation.

State v. Davis, *119 Ariz. 140* (Ariz. App. 1978)

The defendant appealed the condition that she not obtain custody of her two minor children. "The question is whether there is a reasonable nexus between the conditions imposed and the goals to be achieved

by the probation. *Malone v. United States, 502 R.2d 554* (9th Cir. 1974). In the instant case the condition certainly bears a relationship to the prevention of further injury to the children as well as to the rehabilitation of appellant." The condition was upheld.

***Pickett v. Boykin**, 118 Ariz. 261* (Ariz. 1978)

The trial court may order as a condition of probation that the defendant serve a "flat-time" jail sentence.

***State v. Jeffers**, 116 Ariz. 192* (Ariz. App. 1977) - Warrantless search of probationer by probation officer is a proper conditon.

The defendant objected to the condition of "warrantless search" by the probation officer contending it violated his Fourth Amendment right. "Upon suspension of sentence, of necessity there may be imposed a wide variety of conditions that touch upon and curtail rights guaranteed under the constitution." *Porth v. Templar, 453 F.2d 330* (10th Cir. 1971); *State v. Mitchell, 22 N.C.App. 663, 207 S.E.2d 263* (1974). "In *United States v. Consuelo-Gonzalez, 521 F.2d 259* (9th Cir. 1975), it was stated that a court may impose only those conditions which can reasonable be said to contribute both to rehabilitation of the convicted person and to the protection of the public. The appellate court noted that this standard must be flexible, however, in light of the uncertainty as to how rehabilitation is actually accomplished."

***State v. Janise**, 116 Ariz. 557* (Ariz. 1977)

The Arizona Supreme Court upheld the condition that the defendant not drink intoxicating liquors to excess even though he was not alcoholic. The condition merely attempted to regulate use of alcohol, not punish defendant's "status" as an alcoholic.

Probation Extension

State v. Koruch, 220 Ariz. Adv. Rep. 72 (1996) - An extension is a modification, it follows that an extension requires notice to the probationer that his term will be extended.

The defendant was granted probation and allowed to move to California. As a condition of probation, he was ordered to pay restitution. Although he paid restitution as ordered, the defendant had an outstanding balance one month before his probation was to expire. The defendant's probation officer obtained a modification extending probation for three years. Neither the officer nor the state attempted to give the defendant or his attorney notice of the petition request or the order.

Since the defendant's California probation officer was unaware of this extension, he advised the defendant that his case was terminated and supervision would no longer be required. When the defendant stopped making restitution payments, he was advised by his Maricopa County probation officer of the extension and that he was in violation of his probation. The defendant filed a motion to vacate the modification, contending his due process rights were violated through lack of notice. The trial court denied the motion. The defendant appealed.

While this appeal was pending, the defendant, on advice of counsel, suspended restitution payments believing his obligation was stayed pending the appeal. The state filed a petition to revoke probation. (At the defendant's violation hearing, testimony was offered that it is common practice of the Maricopa County Probation Department not to give notice of extensions to most out-of-county probationers.) The trial court held that Rule 31.6 provision staying restitution pending appeal applies only to appeals from the original conviction. The defendant was found in violation and reinstated to probation for an additional three years. The defendant appealed again.

In both appeals, memorandum decisions were provided. In the first, the court of appeals held that the defendant should have been given notice but that this error was corrected by the violation hearing. In the second decision, the court of appeals affirmed the violation and probation extension.

The defendant appealed. Although all five Arizona Supreme Court Justices agreed to vacate the defendant's extension of probation and the subsequent hearings, they differed four-to-one on the basis of their rulings. The majority proceeded from a constitutional, due process basis. Relying on *Nieuwenhuis v. Kelly*, 795 P.2d 823 (1990) and *Green v. Superior Court*, 132 Ariz. 468 (Ariz. 1982), the four Justices held:

> [b]ecause Arizona cases interpreting the Fourteenth Amendment hold that modifications require notice and a hearing, and because an extension is a modification, it follows that an extension requires notice to the probationer that his term will be extended . . . On the facts of the case, we hold defendant was denied federal due process when his probation was extended and modified without notice.

In dissent, but arriving at the same outcome, Justice Martone held that the case should be decided upon state statute and rule rather than constitutional considerations. Relying upon A.R.S. § 13-804(K) and Rule 27.2, Ariz. R. Crim. P., Justice Martone held that this statute and rule required notice to the defendant. "According a probationer notice and an opportunity to be heard before the period of probation is extended to accommodate restitution is a good idea, one which our statute and rule embrace. We even ought to consider extending it to probation periods generally, as has the United States."

State v. Cobb, 762 P.2d 1339 (1988)

A petition to extend the defendant's probation for restitution payment tolls the probation expiration date. The court may extend probation after probation was scheduled to expire if a petition to extend had been entered before expiration date.

Probation Modification

Absent consent, the court may not modify probation unless there has first been a petition filed alleging the reasons for the desired modifications, the defendant has been given adequate notice and an opportunity to contest the modification and present evidence, and the evidence presented is sufficient to convince the court of a change circumstance or other reasonable basis justifying the modification. *Juvenile Action No. J-169, 131 Ariz. 187* (Ariz. App. 1981)

The conditions of probation may be modified at any time, if that condition was part of the plea agreement. *State v. Contreras*

The court may alter conditions of probation for offenders who fail to qualify for shock incarceration without finding that the defendant was in violation of probation. A failure to qualify for shock does not equate to violation. *Nieuwenhuis v. Kelly*

The trial court's authority to modify the condition of probation is limited by the stipulations of the plea agreement. *State v. Rutherford*

Terms and conditions of probation are fixed pending an event which constitutes a reasonable basis to change them. Where additional burdens are imposed on the probationer, the record must contain evidence that the probationer violated a condition of probation upon which to base the burden. The new burden is then imposed in lieu of revocation. *Burton v. Superior Court*

State v. Contreras, 180 Ariz. 450 (Ariz. App. Div. 1 1994) - Restitution can be added any time prior to the expiration or termination of probation whether or not probation is revoked.

This case overthrows *State v. Burton* as far as restitution contained in a plea agreement is concerned. The court of appeals held:

> When the trial court suspends sentence and orders probation, the sentence is not final. The court retains jurisdiction over the probationary terms and the probationer until the term of probation is successfully completed or until it is revoked and a prison sentence ordered. A.R.S. § 13-603(B). As the defendant knew, A.R.S. § 13-901(c) provides that the trial court may, in its discretion, modify or add to the conditions of probation "at any time prior to the expiration or termination of the period of probation," whether or not probation is revoked. *State v Foy, 176 Ariz. 166* (App. 1993). In light of this clear statutory statement to the contrary, the defendant's argument that his initial probationary terms constituted a judgment which could not be disturbed fails.

The court of appeals permitted the addition of restitution two months after the defendant was sentenced.

Nieuwenhuis v. Kelly, 795 P.2d 823 (1990)

The court may alter conditions of probation for offenders who fail to qualify for shock incarceration without finding that the defendant was in violation of probation. A failure to qualify for shock does not equate to violation. The court could add 90 days in jail as a condition, replacing the original 120 shock incarceration days because it would be less onerous.

State v. Adams, 159 Ariz. 168 (1988)

On appeal, the defendant sought to withdraw from his plea agreement because the court did not tell of the specific amount of restitution ($100) as required by *Phillips*, 152 Ariz. 533 (1987). The defendant argued that *Phillips* had retroactive effect. The court of appeals ruled that *Phillips* was not retroactive. The defendant appealed.

The Arizona Supreme Court held that *Phillips* applies retroactively, but only to cases not final at the time it was decided. Noting that the amount of restitution was insignificant, the Arizona Supreme Court held that the amount was irrelevant to the defendant's decision to plead as was ruled in *State v. Grijalba*. 157 Ariz. 112 (1988). The plea agreement was upheld.

State v. Taylor, 158 Ariz. 561 (1988) - The court must grant a restitution hearing when the defendant requests it and the state may not with draw from a plea if he does so.

The defendant's plea agreement provided that he would be liable jointly and severally with the co-defendant for restitution in the amount not greater than $30,000. The defendant, at sentencing, disputed that figure and requested a restitution hearing. The state objected and argued that if the defendant persisted in a hearing, the state should be allowed to withdraw from the plea. When the court indicated that it was "favorably disposed" towards the state's position, the defendant withdrew his request for such a hearing. The court proceeded with sentencing including $30,000 in restitution. The court noted that the defendant could seek a modification of the restitution within 90 days if he had evidence to prove it. The defendant requested such a hearing within the 90 days. The court denied his request noting the defendant failed to submit evidence to warrant a change. The defendant appealed.

The court of appeals held that it was plainly an error on the trial court's part to have been "favorably disposed" to tying the defendant's request for a restitution hearing to the state's withdrawal from the plea agreement. "Defendant's persistence in requesting a hearing would neither have violated his plea agreement nor have entitled the State's withdrawal." The restitution order was set aside and remanded to the trial court to conduct a restitution hearing.

State v. Rutherford, 154 Ariz. 486 (1987) - The trial court's authority to modify the condition of probation is limited by the plea agreement. Both parties must agree to such a modification.

As part of the defendant's placement on probation, the plea agreement included that the defendant would serve one year "flat" in the county jail. After serving most of his jail time, the defendant requested a modification to resolve some family emergencies. Although the state opposed the modification, the court granted it relying on *State v. Superior Court*, 125 Ariz. 575 (1980). The trial court believed the conditions of probation, including the jail term, were discretionary, not jurisdictional. The state appealed.

The court of appeals noted that it was clear that the trial court has the authority to modify probation. However, the discretionary authority given the sentencing court to impose, modify, or revoke probation is limited by statutory provisions as well as constitutional due process consideration. *Green v. Superior Court*, 132 Ariz. 468 (1982). In the instant case, the trial court's authority to modify the condition of probation was limited by the plea agreement. " . . . without the State's consent, the parties' stipulation barred the trial court, once it accepted the plea and sentenced defendant, from modifying the condition requiring a one-year jail term under rule 27.2. The trial court's order was vacated."

Green v. Superior Court*, 132 Ariz. 468* (Ariz. 1982) - The statutes do not allow a defendant to spend more than a year in jail as a condition of probation.

In a special action, the Arizona Supreme Court noted that ". . . we recognize the power of a sentencing court to modify probation for reasons that may not otherwise warrant revocation of probation. See A.R.S. § 13-901(C); Rule 27.2, Rules of Criminal Procedure, 17 A.R.S. As we have noted in the comment to Rule 27.2:

> This provision is included to protect the probationer from arbitrary conditions or regulations, to provide a formal means short of violation and revocation proceedings for the probationer to have ambiguous conditions or regulations clarified, to provide added flexibility to the probation process, see ABA Standards Relating to Probation 3.3 (Approved Draft, 1970), and, on the suggestion of probation officials, to provide a means for invoking the authority of the court when the probationer seems to be slipping toward revocation without risking that ultimate sanction.

Nevertheless, the discretionary power given the sentencing court to impose, modify, or revoke probation is limited by several statutory provisions, as well as constitutional due process considerations."

For these reasons, the Arizona Supreme Court overturned the trial court's modification of the defendant's conditions ordering him to serve more than a year in jail. The statutes did not allow a defendant to spend more than a year in jail as a condition of probation.

Juvenile Action No. J-169, 131 Ariz. 187 (Ariz. App. 1981) - Absent the juvenile's consent, the juvenile court may not modify probation (or change the disposition of a delinquent juvenile) unless there has first been a petition filed alleging the reasons for the desired modifications, the juvenile has been given adequate notice and an opportunity to contest the modification and present evidence, and the evidence presented is sufficient to convince the juvenile court of a change circumstance or other reasonable basis justifying the modification.

The juvenile's placement was modified by the court without consent of the juvenile. The court of appeals relied upon *Burton v. Superior Court*, 27 Ariz. App. 797 (1977) to require due process procedures for modifications. "In Burton, the court considered both Rule 27.2 . . . and Arizona Revised Statute § 13-901. The court held that where neither the petition for modification nor the evidence introduced at the subsequent hearing showed any changed circumstances or any reasonable basis justifying the addition of a new probation condition (restitution), the trial court abused its discretion by imposing the new condition. We believe the same reasoning to be applicable here. We therefore hold that, absent consent, the juvenile court may not modify probation (or change the disposition of a delinquent juvenile) unless there has first been a petition filed alleging the reasons for the desired modifications, the juvenile has been given adequate notice and an opportunity to contest the modification and present evidence, and the evidence presented is sufficient to convince the juvenile court of a change circumstance or other reasonable basis justifying the modification." The juvenile court's order was vacated.

Burton v. Superior Court, *27 Ariz. App. 797* (Ariz. App. 1977) - There must be some changed circumstance or reasonable basis to justify the addition of a new condition for probation after sentencing.

Fifteen months after the defendant was granted probation, a victim made a restitution claim. Upon the county attorney's request, the court modified the defendant's probation to include restitution.

In a special action, the court of appeals overturned this action. The court of appeals held that Judge Carson exceeded her authority by modifying the defendant's conditions 15 months after sentencing to add restitution. The court reasoned that " . . . neither the petition to modify nor the evidence introduced at the hearing showed any changed circumstance or any reasonable basis justifying the addition of a new condition for probation. Restitution or non-restitution was decided at the time of sentencing and nothing new--no new event--was alleged or established at the hearing. In our opinion such an allegation is necessary."

> The purpose of Rule 27.2 is set forth in our Supreme Court's Comment to the rule:
> This provision is included to protect the probationer from arbitrary conditions or regulations, to provide a formal means short of violation and revocation proceedings for the probationer to have ambiguous conditions or regulations clarified, to provide added flexibility to the probation process, see ABA Standards Relating to Probation 3.3 (Approved Draft, 1970), and, on the suggestion of probation officials, to provide a means for invoking the authority of the court when the probationer seems to be slipping toward revocation without risking that ultimate sanction. Arizona Revised Statute § 13-1657(D) (Supp.1972) gives the sentencing court the power to modify the terms of probation.

Arizona Revised Statute § 13-1657(D) states:

> The court may at any time during the period of probation revoke or modify its order of suspension of imposition or execution of sentence. It may at any time, when the ends of

> justice will be subserved thereby, and when the good conduct and reform of the person so held on probation warrants it, terminate the period of probation and discharge the person so held, and in all instances, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

The wide discretion to modify or revoke probation is, of course, limited by the rule of reasonableness. A reasonable basis must exist in order for the trial judge to either modify or revoke the terms of probation. This is necessary because of the nature of the sentencing process, where, following a guilty plea or conviction of a crime, the trial judge has the duty to sentence the defendant. Arizona Revised Statute § 13-1642. When probation is deemed appropriate, Arizona Revised Statute § 13-1657 permits the trial judge, in lieu of sentence, to suspend the imposition of sentence and place the defendant on probation under terms and conditions set by the judge. Either route, sentence or suspended sentence and probation, is final and appealable at the time of its 'pronouncement' by the court. Rule 26.16, Rules of Criminal Procedure. Where sentence is suspended and the defendant is placed on probation on certain specific terms and conditions, those terms and conditions are fixed pending an event which constitutes a reasonable basis to change them . . . Where additional burdens are imposed on the probationer, such as additional restitution, as in this case, the record must contain evidence that the probationer violated a condition of probation upon which to base the burden. The new burden is then imposed in lieu of revocation."

Probation Termination

State v. Buonofede, 89 Ariz. Adv. Rep. 24, 814 P.2d 1381 (1991) - There is no statutory authorization for the court to grant a finding of rehabilitation.

The Arizona Supreme Court held that the trial court exceeded its jurisdiction in considering the application for a finding of rehabilitation. It rejected the appeal court's assertion that early termination of probation necessarily implies rehabilitation. The matter was remanded for dismissal. There is no statutory authorization for the court to grant a finding of rehabilitation.

State v. Brooks, 777 P.2d 676 (1989)

The court has the authority to vacate an order of probation discharge which was entered by mistake. Judge Wilkinson signed an order of discharge, not knowing the state had objected and a petition to revoke had been issued in another court. When he learned of it, he vacated the order of discharge. The court of appeals concurred.

State v. Patel, 770 P.2d 390 (1989)

The state may not prevent the court from terminating probation early. Although the defendant's plea agreement provided for five years probation, the state may not prevent the court from terminating probation early. While the state may bargain for a specific jail term as part of the plea and the court may not modify it if the plea is accepted (see *Rutherford*), the state may not infringe on the court's right to terminate probation early as provided by statute.

State v. Findler, 732 P.2d 1123 (1987)

The court does not have authority to terminate probation unsuccessfully.

State v. Moore, 717 P.2d 480 (1986)

The court does not have the authority to terminate probation as unsuccessfully completed. Probation may be terminated early " . . . if in the court's opinion the ends of justice will be served thereby and if the conduct of the defendant on probation warrants it." [A.R.S. § 13-901(e)] The statute implies conduct must indicate rehabilitation since this is the purpose of probation.

Probation Violation

General Principles

Revocation procedures are outlined by Rules of Criminal Procedure Rule numbers 27.7 through 27.10. These include that a violation is established by preponderance of the evidence.

Violation hearings must be timely, even if the defendant is in prison or jail elsewhere. The state has a number of options it can pursue in such cases to ensure timeliness. *State v. Adler* and *State v. Fleming*

If a defendant placed on IPS is found to have committed a new felony, the court must sentence him/her to prison. *State v. Taylor*

The court must consider pertinent mitigating and aggravating factors in probation violation sentences. The court must impose a sentence because of the original offense, not the violation alone. *State v. Baum*

The court and probation officers must commit to writing any required stipulations in order to hold the defendant accountable at a revocation hearing. *State v. Robinson* and *State v. Jones*

While it is desirable that such programs as shock incarceration, counseling, and education programs provide written rules and regulations, it is not required for revocation purposes. *State v. Alves*

Probation officers may testify to the results of urinalysis testing, but a better practice is to provide a copy of the test results. *State v. Snider*

Conditions limiting the defendant's contact with minors need to be specific. *State v. Martin*

Civil traffic offenses may not be alleged as a condition one violation. *State v. Sheehan*

Probation officers may be deposed. *Kanuck v. Meehan*

If the court does not accept the stipulation of the defendant's probation violation agreement, the defendant has the right to withdraw. State *v. Flowers*. However, the defendant may not request a new judge. *State v. Hanes*

A defendant may not have probation revoked for failing to pay court-ordered payments without a determination if he/she has the ability to pay. *State v. Davis*

If the defendant is sentenced to prison on a number of violations and one of the violations is reversed on appeal, the defendant must be resentenced if the court did not reflect on the record the same sentence would have been imposed regardless of the number of violations. *State v. Ojeda*

The exclusionary rule does not apply to probation violation hearings. *State v. Alfaro*

Statements made by defendant about new crimes to the supervising probation officer who did not provide Miranda warnings may be used in probation violation, but not any subsequent new charges. *State v. Magby*

Probation violations involving allegation of new offenses should proceed independent of the court proceedings on the new offense. *State v. Jameson*

Defendants may not be released on bail from probation violation custody unless there are reasonable grounds to believe the final changes will be set aside. *State v. Arnold*

The rule of exclusion will not prevent introduction of such evidence at a probation violation hearing. *United States v. Farmer*

In re Jonah T., 304 Ariz. Adv. Rep. 26 (1999) - There is no authority that allows an administrative order to govern, or conflict with, the rule of admissibility of otherwise reliable evidence or limit the statutory discretion afforded the juvenile court in dispositional alternatives in a juvenile probation revocation proceeding. Standards for drug testing evidence are not governed by Administrative Order No. 95-20.

In this matter, the court of appeals consolidated two juvenile appeals to address a common issue: were the results of the drug testing invalid because the testing standards did not comply with the Arizona Supreme Court's *Administrative Requirements for Adults and Juvenile Probation and Pre-Trial Services Drug Testing*, Administrative Order No. 95-20, effective March 16, 1995?

In *Jacob W.* and *Jonah T.*, the probation department petitioned to revoke the juveniles' probations when immunoassay drug testing revealed the presence of marijuana in their urine samples. In neither case did the drug laboratory conduct a confirmatory GC/MS test or the probation department request one as required by Administrative Order 95-20. Both juveniles denied the violations. Both were found to have violated their probations by using marijuana. Jacob W. was ordered to be detained for 30 days with an additional two months weekend incarceration. Jonah T. was reinstated to probation. In both cases, the defense appealed arguing against the admissibility of the evidence since it did not comply with the administrative order. Jacob W. also appealed the imposition of the detention.

Administrative Order 95-20 requires that if an offender denies the results of a drug testing completed by preliminary screening using the immunoassay method and the tests results are to be used in court, that sample must be retested using the more stringent Gas Chromatography/Mass Spectrometry (GC/MS) method. In neither of these cases was that additional test completed.

The defense argued that noncompliance with this administrative order was similar to noncompliance with the Department of Health Services(DHS) standards in DUI cases. In DUI cases which do not conform to DHS standards, the evidence has been determined to be unreliable and therefore, inadmissible.

The court of appeals did not find these two situations to be analogous. In the DUI cases, statutes require compliance with DHS standards. In contrast, legislation was never adopted to govern or limit the use of immunoassay testing in probation revocation matters. The court of appeals held that the administrative

order did not rise to the level of statutory regulations.

> This administrative order, obviously well-researched and laudable in purpose, was intended to direct the appropriate court administrative personnel to establish uniform testing procedures. It did not, however, constitute a 'rule of court,' which would prescribe a procedural course of conduct that could deprive the parties of substantive rights for noncompliance. *See Espinoza v. Martin*, 182 Ariz. At 149, 894 P.2d at 692. Before they could be applied to suppress evidence or restrict dispositional alternatives, the policies and procedures set forth in Administrative Order 95-20 would have to be adopted as a court rule by the Arizona Supreme Court under its rule-making authority. In summary, we find no authority that would allow an administrative order to govern, or conflict with, the rule of admissibility of otherwise reliable evidence or limit the statutory discretion afforded the juvenile court in dispositional alternatives in a juvenile probation revocation proceeding. The policies and procedures adopted by Administrative Order 95-20 were directed at administrative court personnel, with enforcement placed in the hands of court administrators, not trial judges. We find no constitutional or statutory basis to construe Administrative Order 95-20 as affecting a substantiative change in the law. We therefore conclude that Administrative Order 95-20 did not preclude the admission of the immunoassay urine tests in these cases, nor did it limit the juvenile court's dispositional alternatives, even in the absence of a confirmatory GC/MS test.

State v. Quintana, 303 Ariz. Adv. Rep. 5 (1999) - Once a defendant is found to have violated the conditions of probation, the trial court can increase the probation period up to the statutory maximum.

After a jury deadlocked on the defendant's charge of trespass, a felony, the state amended the charge to a misdemeanor. At a subsequent bench trial, the defendant was found guilty of this charge and placed on probation for six months. Later, he was found in violation of that probation. The court increased the term of probation to two years. The defendant appealed arguing he had been denied a right to a jury trial and that the court erred by increasing the length of his probation.

The court of appeals held that since the state amended the charge to a misdemeanor, the defendant was not eligible for a jury trial. These facts are distinguishable from *State v. Frey*, 141 Ariz. 321, 686 P.2d 1291 (App. 1984), where the trial judge unilaterally reduced the charge from a felony to a misdemeanor.

Citing *State v. Blackman*, 114 Ariz. 517, 518, 562 P.2d 397, 398 (App. 1977) and *State v. Findler*, 152 Ariz. 385, 386, 732 P.2d 1123, 1124 (App. 1987), the court of appeals noted that once a defendant is found to have violated the conditions of probation, the trial court can increase the probation period up to the statutory maximum. The trial court's rulings were affirmed.

State v. Adler, 247 Ariz. Adv. Rep. 13 (1997) - Five years to initiate the violation hearing is unreasonable delay and prejudiced the probationer.

The defendant was granted probation in 1987 and allowed to move to California. Within a year interstate supervision by California was denied and the defendant had absconded. In July 1988, the probation officer filed a petition to revoke probation. No effort was made by the state to proceed with a revocation *in absentia*.

The defendant was arrested on federal charges in May, 1990. He was sentenced to prison on these charges with a release scheduled for July, 1995. The defendant filed a motion for a speedy trial on his probation violation or a disposition in absentia. A representative from the county attorney's office indicated to him that it could not obtain custody of him until he had completed his federal sentence. The defendant made additional efforts to obtain a hearing. He was again notified that the state would not initiate any proceeding to obtain custody of him because there was no legal obligation to do so.

In October, 1994, the defendant moved to dismiss the petition to revoke probation, arguing the lengthy delay violated his due process. The motion was denied. On January 6, 1995, a revocation hearing was held with the defendant appearing telephonically from the federal prison and counsel in chambers. He was subsequently found in violation and sentenced to two concurrent terms of imprisonment, but consecutive to the federal imprisonment. The defendant appealed, arguing the delay in his hearing was unreasonable and prejudicial.

In a 2-1 decision, the court of appeals held that the trial court did not abuse its discretion in allowing the state five years to initiate the violation hearing. The majority held that this case differed from *State v. Flemming*, 184 Ariz. 110, 907 P.2d 496 (1995) in a number of areas. Judge Grant dissented reasoning the state should have held the defendant's violation hearing *in absentia*. The defendant appealed.

The Arizona Supreme Court reversed the court of appeals' opinion, finding there was considerable delay in this matter and the defendant was prejudiced by that delay. The supreme court reviewed the basics of probation violations.

A person whose probation is subject to revocation is protected by Due Process Clauses of the Fifth and Fourteenth Amendments and entitled to a revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973).

A violation hearing must be held within a reasonable time. The purpose of providing a timely hearing is to hold the proceeding "while information is fresh and sources are available." *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972).

The federal courts have held that revocation of probation after unreasonable delay is an abuse of discretion. *United States v. Hamilton*, 708 F.2d 1412 (9th Cir. 1983).

In the present matter, the Arizona Supreme Court noted the state could have issued a writ of *habeas corpus ad prosequendum* to return the accused to the county where charges were filed. *State v. Loera* 165 Ariz. 543, 799 P.2d 884 (App.1990). The supreme court found the state's argument without merit that the federal warden had discretion not to honor it and thus, chose not to proceed with it.

The supreme court noted another avenue to preclude prejudice would have been for the probation office to petition the court for revocation in absentia 60 days after the defendant's whereabouts became unknown as permitted by Arizona Rule of Criminal Procedure 27.9. Or the state could have proceeded with the hearing telephonically as it eventually did. *State v. Adler*, 187 Ariz. 572, 931 P.2d 1082 (App. 1996). As with *Flemming*, "Neither [the] rules, nor the Constitution, contemplates that probation revocation proceedings will begin after a lengthy prison sentence."

Reasoning that the proceedings were untimely, the court noted it was still necessary to show that the delay had prejudiced the defendant. *State v. Belcher* 111 Ariz. 580, 535 P.2d 1297 (1975) and *State v. Lee* 27 Ariz. App. 294, 554 P.2d 890 (1976). In this matter, in addition to records being lost during the delay, the defendant had been offered by the state in 1994 concurrent imprisonment with his federal imprisonment. By the time of his revocation hearing, that offer was not made.

For these reasons, the Arizona Supreme Court remanded the case to the trial court to dismiss the petition to revoke with prejudice. Justice Martone dissented, finding that there had been no prejudice to the defendant.

State v. Portis, 187 Ariz. 336, 929 P.2d 687 (1996) - To establish a sufficient chain of custody for physical evidence, the offering party must show continuity of possession.

The defendant was placed on probation following convictions for a series of drug-related offenses. A petition to revoke probation was issued when the defendant was expelled from a residential treatment program for providing a urine sample which tested positive for cocaine. The sample had been collected and processed by the residential treatment program's staff. The probation officer alleged both the use of drugs and failure to complete treatment as the basis for the violation petition.

At the violation hearing, the probation officer was the state's only witness. She testified to the residential program's standard urinalysis procedures. However, she could offer no evidence that these procedures had been applied to the collection of the defendant's positive urine sample. Neither she nor the program's director had spoken to the individual who had collected the sample. The defendant moved to dismiss the petition, arguing the state had failed to prove by a preponderance of the evidence that the defendant had violated his probation. The court, instead, continued the hearing to allow the state to meet its burden of proof.

When the matter resumed three days later, the state called the program director. He testified that the individual he had thought had supervised the collection of the defendant's urine sample had not done so. Rather, one of his assistant's, a recovery drug addict, had collected the sample. On cross-examination, the director could not recall if that assistant had himself been terminated for drug use. Despite this testimony, the court found the defendant in violation of his probation. He was subsequently sentenced to prison. He appealed.

The defendant first argued the trial court erred by allowing the state to reopen the violation hearing for additional proof. The court of appeals disagreed. Probation hearings do not have to mirror criminal trials. In violation matters, the court has greater flexibility than provided by the strict rules of procedure. See *State v. Smith*, 112 Ariz. 416 (1975).

The court of appeals found the defendant's next argument, that the state had failed to meet its burden of proof, more persuasive. "To establish a sufficient chain of 'custody for physical evidence, the offering party must show continuity of possession.'" *State v. Jackson*, 170 Ariz. 89 (App. 1991). This is especially true in the testing of narcotics which is vulnerable to alteration or substitution between collection and testing. *State v. Petralia*, 110 Ariz. 530 (1974).

In this matter, the state failed to establish a reliable connection between the defendant's test results and the sample allegedly obtained from him. The testimony that was received did not meet the reliable hearsay permitted by the Arizona Rule of Criminal Procedures 27.7(b)(3). To be reliable hearsay, the testimony must be trustworthy. *State v. Stotts*, 144 Ariz. 72 (1985).

Because the state did not establish with reliable hearsay evidence that the tested sample came from the defendant, the state failed to meet its burden of proof. The court erred in finding the defendant in violation of his probation by using drugs. And since his termination from the treatment program also was based upon this tested sample, the trial court should not have found him in violation of this condition either. Accordingly, the court of appeals reversed the trial court and remanded for further hearings.

State v. Taylor, 187 Ariz. 567, 931 P.2d 1077 (1996) - If the court finds the defendant committed another felony, it must revoke IPS and sentence the defendant to prison.

The defendant was found to have violated the conditions of his standard and IPS probations by admitting to the use of drugs. Following these admissions, the trial court imposed prison noting ". . . the sentence might well be different" if the court did not feel constrained by A.R.S. § 13-917(B). The trial court felt that this statute required revocation because the defendant was found to have committed an additional felony offense by using drugs. The defendant appealed, arguing that only when a condition 1 allegation is proven must the court revoke IPS.

The court of appeals did not accept this argument. It indicated the statute was quite clear; that if the court found that the defendant had committed another felony, it must revoke IPS and sentence the defendant to prison. " . . . it [the IPS statute] establishes a single criterion . . . to revoke intensive probation: that the court finds that the defendant has committed a felony." They cited that if the defendant is found to have violated IPS by possessing a weapon, this would be a new felony and revocation would be required.

In its closing statements, the court of appeals noted that this interpretation did not relieve the probation officer of any discretion. They indicated the officer has discretion whether or not to file for a violation and has discretion as to the factual basis of any alleged violations.

State v. Fleming, 205 Ariz. Adv. Rep. 3 (1995) - The question of whether the accused has violated the terms of his probation should be promptly resolved, and the Arizona Supreme Court expressly disapproved of the practice of continuing the probation violation hearing until after disposition of the new criminal charges.

The Arizona Supreme Court reviewed the actions of the court of appeals in *State v. Fleming*, 182 Ariz. 239, 895 P.2d 1002 (App. 1994). The defendant was placed on probation in Maricopa County in December 1988 for attempted robbery. While on probation, he was arrested in Pinal County in November 1990 for marijuana charges. Based upon these charges, the Maricopa County Adult Probation Department issued a probation violation warrant and placed a hold on the defendant on December 3, 1990. No other action was taken on the petition to revoke or warrant.

On October 21, 1991, the defendant pled to the Pinal charges and was sentenced to concurrent prison terms. The sentencing judge advised the defendant at the time of his plea that the plea could be used as an automatic violation of probation in Maricopa County and could receive a consecutive sentence. No one could tell the defendant when that matter would be heard in Maricopa County. The presentence report indicated that the Maricopa County probation officer had advised that proceedings were pending and that she anticipated recommending a presumptive, concurrent sentence.

Following sentencing in Pinal County, the defendant was transported to the Department of Corrections. Having heard nothing from Maricopa County and being informed there were no "holds" on him, the defendant initiated a "speedy execution form" to bring the matter to a head. On March 16, 1993, three years after the warrant had been issued, it was served upon the defendant. On March 23, 1993, he appeared before a Maricopa County judge pro tempore who operated on the assumption that the notice of "automatic violation" was in effect. No revocation arraignment and no probation violation hearing were held. The defendant agreed to proceed with sentencing as long as it ran concurrently to his current period of imprisonment. Sentencing was scheduled for another day. At that hearing, another judge pro tempore sentenced the defendant to a consecutive sentence. The defendant appealed.

On review, the court of appeals held that the automatic violation was appropriate since there is only one superior court in Arizona. The Arizona Supreme Court concurred with this statement but saw instead that the issue involved the proper interpretation and application of Rule 27.7(e): "If there is a determination of guilt, as defined by rule 26.1, of a criminal offense *by the court which placed a probationer on probation*, no violation hearing shall be required and the court shall set the matter down for a disposition hearing *at the time set for entry of judgment on the criminal offense* [Emphasis added]."

The Arizona Supreme Court noted:

> According to the court of appeals' approach, because there is only one superior court in the state, a trial judge must always consolidate a probation violation hearing and an underlying criminal proceeding, even if the two cases come from different counties. Thus, under the rationale of the court of appeals, the Pinal County court itself had the defendant on probation and should have set the disposition hearing on the Maricopa County case at the same time as the sentencing in the Pinal County case. That was not done here, nor do we believe it should or could have been done. The Pinal County court should not be expected to make an appropriate disposition in the probation case without having access to the file. The Pinal county court correctly recognized that the probation revocation was a Maricopa County matter.
>
> We believe the court of appeals misapplied Rule 27.7(e). The intent of the rule is to require consolidation and simultaneous dispositions in cases falling within the rule. To have a meaningful sentencing in a criminal case, the trial court must have before it the file in that case including any and all presentence reports, plea agreements, and related documents. By the same token, to have a meaningful disposition in a probation violation proceeding, the court must also have the files for the probation case. Instead of finding an automatic violation, the Maricopa county superior court should have proceeded with the revocation arraignment under Rule 27.7(e).

In addressing the timeliness of the violation proceedings, the Arizona Supreme Court again relied upon *State v. Jameson*, 112 Ariz. 315, 541 P.2d 912 (1975), " . . . the question of whether the accused has violated the terms of his probation should be promptly resolved, and we expressly disapproved of the practice of continuing the probation violation hearing until after disposition of the new criminal charges."

In its summary, the Arizona Supreme Court noted, "The delay on the part of the state has been significant. This delay is not only unexplained, it is inexplicable. To remand this case and begin anew would render the time limits of Rule 27.7 meaningless." The opinion of the court of appeals, the findings of probation violation and the ensuing sentence were vacated. The petition to revoke was dismissed with prejudice.

State v. Adams, 203 Ariz. Adv. Rep. 28 (1995)

The defendant was serving a year in jail as a condition of his probation. He failed to return to jail after being allowed temporary release to attend a counseling session. He was subsequently sentenced to prison for escape and the probation charge. He appealed, arguing that he could not be charged with escape since he had been on probation.

The court of appeals did not agree. "Thus, failure of a probationer to report to his probation officer at a designated place and time would not be an escape because probation supervision is not within the meaning of detention in a correctional facility. Failure of a probationer to return to jail from which he was temporarily released, on the contrary, is an escape."

State v. Baum, 189 Ariz. Adv. Rep. 5 (1995) - When probation is revoked, the trial court must impose a sentence because of the original offense; the sentencing court is without authority to impose punishment for violation of probation alone.

The defendant pled guilty to possession of marijuana for sale. Sentencing options ranged from probation to five years imprisonment. At sentencing, the trial court identified both aggravating and mitigating factors, stating that if the defendant were not granted probation, the likely prison term would be the minimum two years. The court found four years probation preferable to the two years imprisonment.

Months later, a petition to revoke probation was filed, alleging no fees payment. It was subsequently dismissed when the defendant became current on these payments. Later, a second petition was issued alleging the defendant had not fulfilled counseling, reporting, and payment requirements. The defendant's probation was reinstated with a warning that a further violation would result in a maximum prison sentence.

A third petition was filed. The defendant admitted the violations and offered circumstantial explanations. The court responded: "The Court has previously made findings relative to aggravating factors and mitigating factors. Further aggravating factors are that the defendant has not complied with the terms and conditions of his probation. The defendant has not taken this Court seriously in just about anything that the Court has ordered the defendant to do. The court is particularly concerned about the fact that the defendant had to be arrested to be brought back before this Court and that he was, therefore, technically, on absconder status for a period of time. Weighing all these factors, Mr. Baum, you're going to find out that maybe you don't keep your word, but I do, sir . . . The Court finds no mitigating factors to weigh or mitigate against this defendant serving the full term."

The defendant appealed this sentence, questioning the validity of the trial court's imposition of a maximum aggravated sentence as a predetermined consequence of the probation violation. The court of appeals noted a judge may abuse his or her sentencing discretion by issuing a sentence that demonstrates "arbitrariness, capriciousness, or failure to conduct an adequate investigation into the facts relevant to sentencing." *State v. Blanton*, 173 Ariz. 517 (App. 1993). To conduct an adequate investigation, the judge must consider all pertinent mitigating and aggravating factors. *State v. Prentiss*, 163 Ariz. 81 (1990). In this matter, the court of appeals held the trial court failed to do so.

The court of appeals noted, following the second petition to revoke, the trial court expressed its intent to sentence the defendant to the maximum term whatever the nature of the next violation. When probation is revoked, the trial court " . . . must impose a sentence because of the original offense; the sentencing court is without authority to impose punishment for violation of probation alone." *State v. Rowe*, 116 Ariz. 283 (1977). This does not preclude the probation failure from being considered as an aggravating factor. However, even serious criminal activity does not justify a sentence with "so tenuous a connection to the original charge" as to amount to punishment for the violation rather than the original offense. *State v. Herrera*, 121 Ariz. 12 (1978).

"Here the trial court made plain that it was basing its sentence on the violation, not the crime . . . the defendant proved to be a poor probationer, yet none of his probationary violations entailed illegal acts. The trial court, however, did not take this into account. Nor did it give mitigating weight to the fact that the defendant, by the time of sentencing, had avoided illegal behavior for a period of approximately eight years. Nor did the court consider any mitigating circumstances attendant upon the defendant's probationary violations. The court did not examine these matters and did not re-examine aggravating and mitigating factors associated with the defendant's underlying crime because the court adopted in advance a fixed sentence that precluded such consideration." Because the trial court failed to consider pertinent mitigating and aggravating

circumstances, the sentence was vacated and remanded for a new sentencing hearing.

State v. Johnson, 187 Ariz. Adv. Rep. 32 (1995) - The court of appeals felt the judge's signature and date on the petition to revoke probation and his clerk's issuance of a warrant constituted "filing" with the judge as provided by Rule 5(h).

The defendant was granted five years probation on August 9, 1988. On August 6, 1993, his probation officer became aware that the defendant had been accused of committing a new crime. Conscious of the expiration date of the defendant's probation, the officer "walked" a petition to revoke probation and warrant request to the appropriate criminal division judge, who signed and dated it. A warrant for the defendant's arrest was issued that day. However, the paperwork was not forwarded to the Clerk's office until the next working day, August 9, 1993.

Following the defendant's arrest, he argued the trial court had lost jurisdiction in the matter. He pointed out that his probation expired at midnight, August 9, and the court documents had not been filed with the Clerk's office until later that day, thus the court had no jurisdiction to hold him. The trial court dismissed this argument, in part relying upon Rule 5(h) which allows papers to be filed with the court. The defendant appealed raising the question whether the paperwork had been "filed" within the meaning of A.R.S. § 13 - 903(D).

The court of appeals felt the judge's signature and date on the petition to revoke probation and his clerk's issuance of a warrant constituted "filing" with the judge as provided by Rule 5(h). The order revoking the defendant's probation and the sentence imposed were affirmed.

State v. Robinson, 160 Ariz. Adv. Rep. 5 (1994) - Probation shall not be revoked for violation or regulation of which the probationer has not received a written copy. Oral directives will not support a determination of violation of probation.

The defendant's probation officer orally directed the defendant to participate in a domestic violence program. When the defendant failed to do so, the officer filed a petition to revoke probation. At the violation hearing, the defendant admitted he failed to participate in the program despite his officer's oral directive. The defendant's probation was reinstated with six months in jail. On appeal, the court of appeals discouraged the practice of issuing oral directives but upheld the violation because the defendant in open court admitted receiving the directive. The matter was appealed to the Arizona Supreme Court.

In a four to one opinion, the Arizona Supreme Court reversed the court of appeal's decision, vacated the probation violation, and remanded the case to the trial court. The Arizona Supreme Court soundly rejected the state's contention that the general conditions signed by the trial court sufficiently complied with Rule 27.7(c)(2). This rule states in part ". . . Probation shall not be revoked for violation or regulation of which the probationer has not received a written copy". Equally important, the Arizona Supreme Court ruled that even if the defendant admits that he was instructed by the officer verbally, it is insufficient to uphold a violation if the condition had not been provided in writing. According to the Arizona Supreme Court, all conditions must be committed to writing if a probation violation is to be sustained.

The Arizona Supreme Court went on to say that it did not find providing such written notice to be an "onerous requirement." It suggested that in the case at hand, once the officer became aware that the defendant had not complied with the condition, the officer " . . . could have simply written out his order and

given it to the probationer. Then, if the probationer further refused . . . , the probationer would be subject to probation revocation." The Arizona Supreme Court continued by noting oral notice might lead to unfair results. The honest probationer would admit to violating an oral directive and have his probation revoked. A less than honest probationer would deny that the officer had given him a verbal directive and could not have his probation revoked.

State v. Flemming, 177 Ariz. Adv. Rep. 53 (1994) - While the defendant does have a right to a mitigation hearing, he must request it before sentencing. While it did not condone the 17-month delay, the delay did not appear to prejudice the defendant.

Two years after the defendant was granted three years probation in Maricopa County, he was arrested and convicted of drug sales in Pinal County. As a result of these subsequent convictions, the defendant was sentenced to prison. The Maricopa County Attorney's Office filed a petition to revoke the defendant's probation. Seventeen months later, a hearing was held on this petition. The trial court found that, by virtue of the defendant's guilty plea in Pinal County, he was in automatic violation of his probation and sentenced him to a consecutive prison sentence. The defendant appealed, contending: the court in Maricopa County could not forego a violation hearing because the court that found him guilty of the subsequent drug charges was in another county, he was entitled to a mitigation hearing, and delay in the violation hearing was untimely.

The court of appeals noted a probationer is entitled to a hearing before his probation may be revoked. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972). However, a violation hearing is not required before revoking probation when the same court that imposed probation also finds the probationer guilty of a subsequent offense. Rule 27.7(e) and *State v. Vasquez*, 22 Ariz. 37 (1974). As outlined in *Massengill v. Superior Court*, 3 Ariz. 588 (1966), the court of appeals has held that the superior courts of different counties constitute the "same" court for purposes of applying Rule 27.7(e). There is but one superior court in the State of Arizona. Unlike *State v. Zanzot*, 175 Ariz. 83 (1993), in which the court of appeals held that the Superior Court in Maricopa County and Phoenix City Court do not constitute the same court for purposes of Rule 27.7(e), both courts in this matter were superior court divisions.

The court of appeals went on to explain that while the defendant does have a right to a mitigation hearing, he must request it before sentencing. In this matter, the defendant requested it after the court imposed the sentence. There is no absolute right to such a hearing whether or not the defendant requests it.

Lastly, the court of appeals addressed the timeliness of the violation hearing. While it did not condone the 17-month delay, the delay did not appear to prejudice the defendant. The court held that the "problem of logistics" between the two counties was persuasive. The revocation was affirmed.

Wilson v. Ellis, 149 Ariz. Adv. Rep. 39 (1993) - Rule 32.4 allows an indigent defendant who admits a probation violation a transcript of his hearing for use in pursuing a PCR

After the defendant admitted violating his probation, it was revoked and he was sentenced to prison. The defendant's subsequent appeal was denied. He petitioned the trial court for post-conviction relief (PCR) pursuant to Rule 32 and sought a transcript of the probation revocation proceedings. The court of appeals denied the petition for review, noting that the defendant had failed to show the trial court which portions of the transcript were necessary to resolve the issues raised in his PCR petition. The defendant

appealed to the Arizona Supreme Court.

With Justice Martone dissenting, the Arizona Supreme Court determined that the defendant was entitled to the transcript. It noted that " . . . Rule 32.4, properly interpreted, allows an indigent defendant who admits a probation violation a transcript of his hearing for use in pursuing a PCR. . . . When direct appeal is unavailable simply because the defendant admitted the violation, the transcript of the probation revocation hearing is necessary to resolve the issues to be raised in the petition'." Despite the majority's opinion to the contrary, Justice Martone felt this decision would require trial courts to conduct *Anders* review in PCR matters.

State v. Bradley, 175 Ariz. 504, 858 P.2d 649 (1993) - An offender placed on intensive probation supervision conditioned on shock incarceration may be sentenced to prison after having been found ineligible for the shock incarceration program.

The Arizona Supreme Court was asked to decide whether an offender placed on intensive probation supervision conditioned on shock incarceration may be sentenced to prison after having been found ineligible for the shock incarceration program. The court held that such an offender may be subsequently sentenced to prison.

The defendant was placed on IPS with the condition that he complete the shock program. During the eligibility screening by the Department of Corrections, it was determined that the defendant had previously been in prison thus disqualifying him for shock. He was returned to the trial court where he was sentenced to prison. On appeal, the sentence was vacated. Relying on *Nieuwenhuis v. Kelly* 164 Ariz. 603, the court of appeals held that without a finding that the defendant had violated the conditions of his probation, the trial court could not resentence the defendant. Instead, it found the trial court could only modify the sentence.

The Arizona Supreme Court disagreed. It noted that *Nieuwenhuis* " . . . assumed that once placed on probation, it's final, absent violation, even if a precondition to probation fails." Reviewing A.R.S. § 13-915 (H), the Arizona Supreme Court held that if the defendant is returned to the court for "further disposition" this is essentially returning the court to square-one in the sentencing process. The trial court could " . . . sentence unconditionally or conditionally, and, therefore may sentence the person to prison, or place him in intensive probation supervision with revised terms."

State v. Peralta, 143 Ariz. Adv. Rep. 37 (1993) - A defendant's probation can be revoked by the court following a discharge from the shock program.

The defendant's probation was revoked by the court following a discharge from the shock program. The defendant appealed the revocation on several issues. He felt the judge had been arbitrary and capricious in reviewing the alleged violations. Secondly, he argued that the shock program had provided him with no standards of performance. Therefore, the defendant felt he could not have his probation revoked, despite the fact that he testified that he knew his actions violated the program rules. Thirdly, the defendant argued that the court improperly delegated its power to the Department of Corrections by allowing its personnel to decide what was a violation. The court of appeals rejected all these claims and affirmed the sentence.

State v. Freeland, 139 Ariz. Adv. Rep. 54 (1993) - A trial court may take judicial notice of its own files to find probationary status.

Among other issues, the defendant appealed the fact that the trial court in his subsequent DUI charge had taken judicial notice that the defendant was on probation at the time of the commission of the new crime. Judicial notice was made by the fact that the trial court was the same court that had imposed the earlier probation. The defendant appealed relying on *State v. Lee*, 114 Ariz. 101 (1976), that required a certified copy of the earlier conviction.

The court of appeals denied the appeal based on *State v. Rushing*, 156 Ariz. 1 (1988), in which " . . . the Arizona Supreme Court ruled that the trial court may take judicial notice of its own files to find probationary status."

State v. Zanzot, 139 Ariz. Adv. Rep. 39 (1993) - A trial court may find automatic violation only if the subsequent conviction is in its own jurisdiction, e.g., another superior court division.

The defendant was on Intensive Probation Supervision (IPS) when he was convicted in a municipal court for trespassing. At a violation hearing, the defendant admitted to the conviction and the court found him in automatic violation of his probation. The defendant appealed noting the court had not personally addressed him about his rights as required in Rule 27.8.

The court of appeals agreed that the trial court erred by finding the defendant in automatic violation based upon a conviction in another jurisdiction. It ruled that a trial court may find automatic violation only if the subsequent conviction is in its own jurisdiction, e.g., another superior court division. *State v. Shapiro*, 26 Ariz. 536 (1976). However, the error was found to be harmless.

State v. Alves, 122 Ariz. Adv. Rep. 57 (1992) - While it is desirable that programs in which a defendant is required by probation to participate have written policies and procedures, they are not required to substantiate a violation.

The defendant's probation was revoked after he failed to complete the shock incarceration program as a result of violating one of the program's rules. The defendant appealed the revocation arguing that his probation could not be revoked because he was not given a written copy of the shock program's rules and regulations. Relying upon Rules of Criminal Procedures and other appellate decisions that provide probation may not be revoked if the defendant has not been provided a copy of the conditions of probation, the defendant wished to extend this concept to any program in which he was required by probation to participate.

The court of appeals denied the appeal, noting it would be desirable if programs such as shock provided copies of the rules. However, it would be impracticable for the court to extend this requirement to all such programs since participation in such activities as GED, college, and counseling would not generally have such program rules. Moreover, the court felt the revocation procedure provided against termination and arbitrary revocations.

State v. Elmore, 124 Ariz. Adv. Rep. 31 (1992) - Since neither of the counselors was a doctor, there was no violation of the state's doctor/psychologist client privileges

The defendant's probation was revoked and he was sentenced to two concurrent seven year-terms of imprisonment after failing to complete a residential treatment program. He appealed citing four issues. First, the defendant maintained that federal confidentiality rules prevented the court from using the counselor's statements at the violation hearing. The court of appeals ruled the defendant had not taken the proper steps to bring this up at the appeal. However, the court found that since neither of the counselors was a doctor, there was no violation of the state's doctor/psychologist client privileges. The trial court did not abuse its discretion in considering this testimony.

Secondly, the defendant claimed the revocation violated his federal and state due process rights because the probation conditions were too vague and the court allowed a non-party (the program) to arbitrarily enforce the conditions of probation. The record showed the probation officer had given the defendant considerable detail about what to expect in the program. Moreover, the state pointed out that it was the court, not the program, which found the defendant to have violated the conditions of probation. The court of appeals found neither of these issues to have merit.

Thirdly, the defendant contended that there was insufficient evidence presented by the state to find a violation. The trial court did in fact find not that the defendant failed to participate in the program, but that he failed to successfully complete it as ordered.

Lastly, the defendant appealed the trial court's use of the presentence and probation violation reports in making its disposition. He felt they were subjective and biased. The court of appeals reviewed the reports and found them to be valid. The defendant's appeal was denied.

State v. Snider, 118 Ariz. Adv. Rep. 13 (1992) - The probation officer's testimony about drug testing procedures and inability to address how the tests were analyzed was accepted as reliable hearsay, but a better practice would be to introduce the test reports. The 72 days pre-disposition time was "tolled"; time on probation did not start again until after the disposition hearing. The court could impose a year's incarceration without giving the defendant credit for this predisposition time.

The defendant was granted probation in two causes. As a condition of the first probation, the defendant was ordered to serve 45 days. No jail was imposed in the second cause. In May 1990, the probation officer observed a marijuana "roach" at the defendant's home. Two subsequent urinalysis tests were positive for marijuana, and marijuana and cocaine. At the ensuing violation hearing, the probation officer testified about following the department's procedures for collecting urine samples. The officer could not testify as to how the tests were analyzed or the name or qualifications of the analyzer. The officer did not provide the test results himself. The court of appeals ruled this was reliable hearsay, but that a better practice would be to introduce the test reports. The violation was upheld.

In a second issue, the defendant was reinstated to probation in both causes, but was given a 365-day jail term in the second cause. The defendant appealed, citing that he should be entitled to the 72 days awaiting disposition after his arrest for probation violation. The court of appeals held that A.R.S. § 13-901(F) indicates the defendant may serve " . . . no more than 1 year in jail <u>within the period of probation</u>" [emphasis added]. The 72 days pre-disposition time was "tolled"; time on probation did not start again until after the disposition hearing. Accordingly, the court of appeals ruled the sentencing court did not have to give the defendant credit for those 72 days.

State v. Martin, 109 Ariz. Adv. Rep. 74 (1992) - In the condition that the defendant have no contact with

children under the age of eighteen years without specific written permission of the supervising probation officer, the word "contact" was construed to be so vague as to fail to provide Martin with notice about what kind of group association is prohibited.

The defendant was placed on lifetime probation for attempted molestation of a child and as a special condition of probation (#20), the defendant was ordered to " . . . have no contact with children under the age of eighteen years without specific written permission of the supervising probation officer." A petition to revoke was issued alleging violations of conditions 1, 4, and 20. Following a violation hearing, the court found the defendant in violation of conditions 1 & 20 and dismissed the condition 4 allegation. Probation was revoked and the defendant was sentenced to five years in the Department of Corrections. On appeal, the defendant argued the trial court erred in finding him in violation of the special condition 20. During the revocation hearing, the defendant had admitted that his brother, girlfriend and two children under eighteen came to his foster home for dinner. The defendant was never alone with the children. There was no evidence of physical or verbal contact with the children nor any improper behavior on the defendant's part.

The court of appeals found this was insufficient evidence to support a violation of condition 20. The word "contact" was construed to be " . . . so vague as to fail to provide Martin with notice about what kind of group association is prohibited." While intended to prohibit potential sexual contact with minors, the language is so broad as to also prohibit from merely being present with minors in shopping malls, churches or other social events. "More qualified language is needed regarding 'contact' to avoid penalizing such innocent physical presence with other human beings." The violation was set aside. In accordance with *State v. Ojeda*, 159 Ariz. 560, the case was remanded for a new disposition.

State v. Estrada, 98 Ariz. Adv. Rep. 68 (1991)

Although the defendant was not advised that by admitting at a probation violation hearing that he had possessed and used a drug, he could be prosecuted for these crimes, the violation of Rule 27.8 (e) was remedied by the state being precluded from using these statements at any subsequent prosecution.

State v. Stapley, 808 P.2d 347 (1991)

The defendant decided he was unable to pay restitution of $418/month after his work schedule was cut in half. Consequently he paid no restitution and became $2,200 in arrears. The court found him in violation stating he could have made an effort to pay some part of the restitution and reinstated the defendant's probation. On appeal, the defendant claimed that such a requirement to make partial payments was an unwritten condition and he could not be found in violation.

The court of appeals did not concur with the defendant and upheld the violation indicating the defendant had made no "good faith effort" towards paying some part of the restitution and that it was not an "all or nothing" proposition.

State v. Sheehan, 807 P.2d 538 (1991)

The commission of civil traffic offenses (driving without registration, driving left of center) is

different than criminal offenses and as such may not be used as basis for probation violation alleging "obey all laws." These are civil offenses as opposed to traffic offenses classified as misdemeanors (driving while license revoked) which are generally held to violate a requirement to obey all laws.

Kanuck v. Meehan, 798 P.2d 420 (1990) - Probation officers are proper subjects for depositions under Rule 15.3 in probation violation matters

In order to ensure that the defendant is afforded the " . . . basic concepts of fairness, justice and impartiality . . . ," the court of appeals found that probation officers are proper subjects for depositions under Rule 15.3 in probation violation matters. The trial court abused its discretion in denying defendant's petition to order depositions of the supervising probation officer in order to let the defendant determine if the officers acted inappropriately.

Nieuwenhuis v. Kelly, 795 P.2d 823 (1990)

The court may alter conditions of probation for offenders who fail to qualify for shock incarceration without finding that the defendant was in violation of probation. A failure to qualify for shock does not equate to violation. The court could add 90 days in jail as a condition, replacing the original 120 shock incarceration days because it would be less onerous.

State v. Jones, 788 P.2d 1249 (1990)

Judge Foreman placed the defendant on probation including the standard condition #3 to " . . . participate and cooperate in and successfully complete any program of assistance, counseling, or therapy whether outpatient or residential, as directed by the probation officer." The probation officer verbally instructed the defendant to attend TASC. When the defendant failed to do so, revocation was initiated and the defendant's probation was revoked and he was sentenced to the Department of Corrections.

The court of appeals ruled that the requirement to attend TASC had " . . . to be written to serve as a basis for revoking probation. Because it was not, the trial court erred by revoking defendant's probation."

State v. Flowers, 768 P.2d 201 (1989)

If the court does not accept the defendant's probation violation agreement, the defendant has the right to withdraw that admission to violation.

State v. Davis, 769 P.2d 1008 (1989)

Probation may not be revoked for failing to pay court-ordered monies without determining whether the defendant has the ability to pay these.

Despite the court's finding that the defendant violated other conditions as well, since there was no

record if the judge would have revoked the defendant's probation on any of the violations, the case was remanded for a new disposition hearing in accordance with *Ojeda*.

State v. Ojeda, 159 Ariz. 560, 769 P.2d 1106 (1989)

When one or more, but not all, allegations of probation violation are set aside by an appellate court, the case will be returned to the original local court for new disposition hearing, unless the trial court's record shows that it would have imposed the same sentence regardless of the number of allegations it found to have been violated. For example, if the defendant's probation were revoked and the defendant sentenced to prison on several allegations and one or more of these allegations were overturned on appeal, the case would be sent back to the trial court unless the record reflects that the same sentences would have been imposed regardless of the number of violations involved.

Neilson v. Superior Court, 767 P.2d 1185 (1988)

The defendant, who was convicted of a misdemeanor and denied defense counsel, may not have probation revoked and be sentenced to jail. All defendants who face the possibility of incarceration must be offered counsel. The defendant, however, may be fined to the maximum.

State v. Jurado, 755 P.2d 1203 (1988)

The court may revoke an illegal alien's probation for illegally reentering the U.S.

State v. Valentine, 742 P.2d 833 (1987)

At a probation violation hearing, the judge must outline defendant's right to cross-examination and to present his own witnesses.

State v. Hanes, 747 P.2d 626 (1987)

The defendant may not request a new judge if the probation violation plea agreement is rejected by judge.

State v. Talton, 737 P.2d 409 (1987)

The defendant has the right to a mitigation hearing before revocation of probation.

State v. Williams, 131 Ariz. 211 (1982) - Being found not in violation of an allegation of a new crime does not to the respectability of a judgment and does not preclude prosecution on the new charge.

The defendant was on probation for robbery. A petition to revoke probation was issued alleging that the defendant had committed sexual assault. At the violation hearing, the court found that the state had failed to establish a violation by a preponderance of evidence and reinstated the defendant's probation. Subsequently, the defendant was convicted of the sexual assault case in the superior court. As a consequence of this conviction, the defendant's probation was revoked and he was committed to the Arizona Department of Corrections. The defendant appealed citing that collateral estoppel precluded his prosecution for sexual assault after the petition to revoke his probation had been denied.

The court of appeals agreed and reversed the conviction and revocation. *State v. Williams*, 131 Ariz. 218. However, on further appeal, the Arizona Supreme Court, relying upon *Ashe v. Swenson*, 397 U.S. 436, held that the finding in the violation matter " . . . did not rise to the respectability of a judgment . . . and did not preclude prosecution for sexual assault." For the reverse situation where the underlying new offense was dismissed, but the subsequent revocation upheld, see *State v. Jameson*, 112 Ariz. 315 (1975).

Padilla v. Superior Court, 652 P.2d 561 (1982)

This decision authorizes "oral holds" on probationers but warns against unreasonable delays in getting defendant to court for a hearing (prefers within 24 hours for initial appearance).

State v. Alfaro, 623 P.2d 8 (1981)

Since the purpose of a probation violation hearing is not to determine guilt or innocence but whether defendant violated conditions of probation and whether continued probation is an effective means of rehabilitation, " . . . the exclusionary rule does not apply in probation violation hearings."

State v. Watkins, 611 P.2d 923 (1980)

The defendant's signature on implementation is proof of receipt in writing of condition of probation. Conditions do not have to specify specific treatment program. Probation officer may do so by implementation. If defendant does not agree with conditions, he should initiate a modification rather than violation.

State v. Blackman, 114 Ariz. 517 (1977)

The defendant was found in violation of his probation and the court reinstated it for an additional five years, the maximum allowed by the statutes. The defendant appealed.

The court of appeals held that the probation period may not exceed the maximum term. The court went on to indicate that upon a finding of violation, " . . . the court may revoke the probation and pronounce sentence, may terminate the probation period and discharge the probationer, and may reduce the probation period or increase it to the maximum. It has no statutory authority to increase the period beyond the maximum."

State v. Magby, 554 P.2d 1272 (1976)

Statements made to a supervising probation officer by an in-custody defendant about a new crime committed while on probation may be used in probation violation hearing without advising of Miranda rights. However, without Miranda rights, these statements may not be used during the trial on the new charge.

State v. Jameson, 541 P.2d 912 (1975)

Dismissal of the underlying crime in a condition #1 violation does not preclude revocation of probation in that matter. Revocation proceedings should proceed immediately and not be tied to the court results of the new charge. " [W]e express disapproval of the practice of deferring the hearing on probation revocation until after adjudication of guilt or innocence on the criminal charge when both proceedings are based upon the same facts."

State v. Arnold, 540 P.2d 148 (1975)

The defendant may not be released on bail from probation violation custody unless there is reasonable grounds that original conviction would be set aside or reversed on appeal.

United States v. Farmer, 512 F.2d 160 (1975)

The exclusionary rule will not prevent introduction of evidence at a probation violation hearing.

State v. Benton, 19 Ariz. 333, 507 P.2d 135 (1973)

Time spent on probation is not to be credited to a subsequent terminal disposition.

State v. Fimbres, 501 P.2d 14 (1972)

The defendant's statements to the probation officer did not violate his privilege against self-incrimination. The probation officer was allowed to testify about defendant's admissions of committing a new crime while of probation.

Proposition 200 -The Drug Medicalization, Prevention, and Control Act of 1996

Stubblefield v. Trombino, Commissioner for the Superior Court in Maricopa County, 1 CA-SA 99-0261 and 1CA-SA 99-0276 - The provisions of Proposition 200 apply to attempted personal possession of a controlled substance.

Stubblefield and Casella were placed on probation following convictions for attempted personal possession of narcotic drugs. When petitions to revoke their probations were filed, the defendants asserted to the trial court that they could not be sentenced to prison for violating the conditions of their probations, since they were under the jurisdiction of Proposition 200. The trial judge rejected this argument. The defendants filed this special action.

Despite the state's argument against accepting jurisdiction, the court of appeals did accepted jurisdiction noting the question raised had statewide implications and judges in the superior court were ruling on the question in different ways.

The court of appeals compared this issue to that raised in *State v. Lammie*, 164 Ariz. 377, 793 P.2d 134 (App 1990). In that case, the court of appeals held that the statute requiring convicted sex offenders to register as such also applied to those convicted of attempted sex offenses, even though that statute did not specifically refer to attempted offenses. In that case, like the present matter, an attempt is generally recognized as part of a completed offense.

The court of appeals went on to note that: "It would be illogical to hold that Proposition 200 applies to possession of narcotic drugs but that it does not apply to the less serious offense of attempted possession of narcotic drugs." Accordingly, the court of appeals remanded the matters to the trial court for further proceedings consistent with this opinion.

State v. Jones, 303 Ariz. Adv. Rep. 9 (1999) - Proposition 200 first- and second-time offenders who violate probation must be reinstated to probation and cannot be incarcerated. Even if placed on IPS and commit a new crime, these Proposition 200 offenders cannot have probation revoked and be sentenced to prison.

In 1998, Tyrus Jones was placed on intensive probation for three years following his plea to possession of narcotic drugs, a class 4 felony. Additional conditions of IPS included a period of jail and community service. Sometime later while on probation, he was convicted of possession of marijuana, a class 6 undesignated offense. This conviction prompted an automatic violation of his probation. For the new marijuana offense, the defendant was placed on IPS, fined and incarcerated in the county jail for an additional term. He was reinstated on IPS on his original charge.

In 1998, Kathleen Oliver was placed on four years IPS following her conviction for possession of narcotic drugs, a class 4 felony. As part of the conditions of this probation, she was incarcerated in the county jail and ordered to complete community supervision. Several months later, she was convicted of attempted possession of narcotic drugs, a class 5 felony. For this offense, she was placed on standard probation. She was reinstated to IPS on the earlier conviction.

The state appealed both these matters arguing the trial judge felt she could not sentence these defendants to prison for the violations. The appeals were consolidated.

The court of appeals first reviewed A.R.S. § 13-901.01(E) which provides that if a defendant who is placed on probation pursuant to Proposition 200 violates probation, he or she

> shall have new conditions of probation established by the court. The court shall select the additional conditions it deems necessary, including intensified drug treatment, community service, intensive probation, home arrest, or any other *sanctions short of incarceration*. [Emphasis added]

In its appeal, the state argued that if the court places a Proposition 200 defendant on IPS and he or she subsequently violate IPS, then they fall under the entire statutory scheme of IPS. Accordingly, A.R.S. § 13-917(B) requires a mandatory prison sentence for violation of IPS. The state explained away the "short of incarceration" requirement by saying it applied only to first-time offenders and not to second-time offenders placed on IPS.

The court of appeals disagreed with this interpretation. Looking at A.R.S. § 13-901.01 in its entirety, the court noted that A.R.S. § 13-901.01(E) is very specific. It states that " A person who has been placed on probation under the provisions of this section . . ." The court of appeals went on to state

> Logically, subsection (E) sets forth the permissible punishment for a violation of probation imposed under any of the subsections of section 13-901.01, not just for a violation of probation imposed under subsection (A). Had the drafters [of the statute] intended otherwise, they could have said so instead of referring broadly to "probation imposed under the provisions of this section.

The court of appeals concluded that mandatory probation for these two cases was in keeping with the statutes. They also noted that Division Two reached the same conclusion in *State v. Thomas*, 301 Ariz. Adv. Rep. 3 (App. July 29, 1999).

State v. Thomas, 301 Ariz. Adv. Rep. 3 (1999) - Proposition 200 probationers cannot be sentenced to prison following a violation, even if they were placed on IPS.

The defendant was placed on probation for possession of narcotic drugs in accordance with A.R.S. § 13-901.01. Following a petition to revoke probation, he was placed on IPS. A second petition to revoke probation was filed. The court found the defendant in violation of the conditions of his probation, revoked that probation and sentenced him to 2.5 years in prison. The defendant appealed, challenging the sufficiency of the evidence to support the finding that he violated his probation conditions and arguing the court was precluded by Proposition 200 from sentencing him to prison.

The court of appeals prefaced it findings concerning the sufficiency of the evidence by citing three established precedents in probation violation matters.

1. It will uphold a trial court's finding of probation violation unless that finding is arbitrary or unsupported by the evidence. *State v. Moore*, 125 Ariz. 305, 609 P.2d 575 (1980).
2. The evidence in such matters is not insufficient simply because the testimony may be conflicting. *State v. Ballinger*, 110 Ariz. 422, 520 P.2d 294 (1974).
3. It is for the trial court to resolve such conflicting testimony and to assess the credibility of the witnesses in so doing. *State v. Hunter*, 112 Ariz. 128, 539 P.2d 885 (1975).

The court of appeals then reviewed the different allegations and conflicting statements and upheld the trial court's finding of each violation.

Next the court of appeals addressed the defendant's argument that Proposition 200 precluded the court from sentencing him to prison after he was found in violation of the condition of his probation.

Beginning its analysis of the defendant's argument, the court of appeals noted A.R.S. § 13-901.01(E) provides that if a defendant is found to have violated the conditions of probation, the defendant:

> shall have new conditions of probation established by the court. The court shall select the additional conditions it deems necessary, including intensive drug treatment, community service, intensive

probation, home arrest, or any other sanction short of incarceration.

Although the state conceded that *Calik v. Superior Court*, 274 Ariz. Adv. Rep. 35 (1998) and *Mejia v. Irwin*, 289 Ariz. Adv. Rep. 3 (1999) determined that Proposition 200 prohibits imposing incarceration as a sanction for violating probation, it argued that once the defendant was on IPS, A.R.S. § 13-917(B) required that the defendant be sentenced to prison. It suggested that A.R.S. § 13-901.01 is ambiguous because it is in conflict with A.R.S. § 13-917 and that to allow the defendant to violate IPS by committing the new crime of using drugs essentially repealed § 13-917.

As it did in *Calik*, the court of appeals disagreed with this argument. The court "harmonized" any perceived conflict in these two statutes by finding that Proposition 200 defendants are a limited group within the IPS category and they cannot be sentenced to prison. In vacating the trial court's disposition order, the court of appeals noted

> We recognize that trial courts' options for noncompliant probationers placed on probation pursuant to the Act [Proposition 200] are limited; nevertheless, courts may not circumvent the mandate of the Act but only alter or add conditions of probation.

Gray v. Irwin, 293 Ariz. Adv. Rep. 14 (1999) - For the purposes of Proposition 200, priors refer only to drug priors.

The defendant pled guilty to possession of dangerous drugs. He admitted that he had a prior forgery conviction in 1983 and a prior possession of dangerous drugs conviction in 1995. Because he had only one prior drug conviction, the defendant argued he was eligible to be sentenced under the stipulations of Proposition 200. The trial court concluded the defendant had two prior convictions and that probation was not available and sentenced the defendant to prison. The defendant filed a special action.

In its holding, the court of appeals reviewed A.R.S. §13-901.01 subsections (F) and (G). Subsection (F) allows the court to impose additional conditions of probation for those convicted of a second personal possession or use drug charge. Subsection (G) provides that a person who has been convicted three times of personal possession or use is not eligible for probation. In the present matter, the trial court used subsection (G), even though the language of the statute specifies drug possessions priors. The court of appeals reasoned that these statutes intended that first time drug users were to be placed on probation, second time drug users could receive additional conditions of probation, and third-time drug users were to be sentenced to prison. The trial court in this matter erred in converting the defendant's forgery conviction to a third drug charge. Accordingly, relief was granted and the matter was remanded for resentencing under subsection (F) rather than subsection (G).

Calik v. Superior Court in Yuma County, 274 Ariz. Adv. Rep. 35, (1998) - Nothing in the language of section 13-901.01 pertaining to initial probation terms suggest any intent to divest courts of their authority to impose incarceration in jail as a condition of probation.

The defendant pled guilty to possession of methamphetamine. Since the defendant had no prior criminal history, the court placed him on probation in accordance with A.R.S. § 13-901.01. Additionally, the court determined that it could impose incarceration in the county jail as a condition of probation. Prior to sentencing, the defendant requested and was granted a stay in order to file a special action,

arguing that Proposition 200 precluded incarceration.

The court of appeals noted that Proposition 200 requires the court to suspend sentencing and impose probation and treatment. "However, Proposition 200 did not address whether courts, acting under section 13-901.01, can impose conditions of probation other than those specified in the proposition." Directions for this must be obtained from later legislative intent.

Senate Bill 1373 enacted A.R.S. § 31-3422 which authorized counties to establish "drug courts." As part of the drug court, a defendant could be ordered incarcerated in a county jail not to exceed a year. Senate Bill 1373 also amended A.R.S. § 13-901 to include the following provision:

> If the defendant meets the criteria set forth in section 13-901.01 or 13-3422, the court may place the defendant on probation pursuant to either section. If a defendant is placed on probation pursuant to section 13-901.01 or 13-3422, the court may impose any term of probation authorized by this section.

A.R.S. § 13-901(F) authorizes incarceration as a condition of probation, as long as the period actually spent in confinement does not exceed one year or the maximum period of imprisonment, whichever is shorter.

The court of appeals went on to note that Proposition 200 spoke solely in terms of prison sentences, but nowhere referred to jail as a condition of probation.

> Nothing in the language of section 13-901.01 pertaining to initial probation terms suggest any intent to divest courts of their long-standing authority to impose incarceration in jail as a condition of probation . . . We conclude that the combined effect of A.R.S. § sections 13-901 and 13-901.01 is to permit incarceration in jail as a condition of probation and that the effect is consistent with the language and policies of Proposition 200.

Mejia v. Irwin, 289 Ariz. Adv. Rep. 3 (1999) - Once the court accepts the defendant's plea and sentences him in accordance with A.R.S. §13-901.01, it cannot later at a violation use the underlying facts of the original charges to re-sentence the defendant for a crime for which has never been convicted, e.g sale of drugs. To do so would be analogous to sentencing the defendant for a crime which was dismissed as part of the plea agreement. The court can, however, consider the facts underlying the defendant's plea as aggravating factors.

The defendant was charged with possession of drugs for sale and transporting drugs. He pleaded guilty to a reduced charge of possession of dangerous drugs and was placed on probation as a first-time drug offender pursuant to A.R.S. §13-901.01 (Supp. 1998). He subsequently violated his probation. At the disposition hearing, the trial court reviewed the facts of the original charge and determined that the defendant had committed the offenses of possession of drugs for sale and transportation of drugs as originally charged. Citing those charges, the court sentenced him to prison. The defendant filed a special action.

The court of appeals noted that a plea agreement is like a contract between the state and the defendant and is subject to contract interpretation. The court may decline to accept a plea or the stipulations of a plea and then allow the defendant to withdraw from the plea. *State v. Taylor*, 158 Ariz. 561, 563-564, 764 P.2d 46, 48-49 (App. 1988) (when the court accepted the plea, it was bound by the terms of the agreement) and *State v. Williams*, 131 Ariz. 411, 412, 641 P.2d 899, 900 (App. 1982) (a trial court may reject a stipulated sentence and allow the parties to withdraw from the plea agreement, but it may not impose a sentence contrary

to the plea agreement). The court may also reject a stipulated probation plea if it determines that the defendant is not entitled to the sentenced pursuant to A.R.S. §13-901.01. *Bolton v. Superior Court*, 190 Ariz. 201, 203, 945 P.2d 1332, 1334 (App. 1997).

However, once the court accepts the defendant's plea and sentences him in accordance with A.R.S. §13-901.01 as was done in this case, it cannot later use the underlying facts to re-sentence the defendant for a crime for which has never been convicted, e.g sale of and transporting drugs. To do so would be analogous to sentencing the defendant for a crime which was dismissed as part of the plea agreement. The court can, however, consider the facts underlying the defendant's plea as aggravating factors. *State v. Hanley*, 108 Ariz. 144, 146, 493 P.2d 1201, 1203 (1972). But in this matter, since the defendant was a first-time drug offender sentenced in accordance with A.R.S. §13-901.01, the only option open to the court was probation. The matter was remanded for re-sentencing.

Goddard v. State of Arizona, 262 Ariz. Adv. Rep. 11 (1998) - The court of appeals did not agree with the defendant's argument that since possession of narcotic drugs for sale was not outlined in A.R.S. § 13-901.01(G), the court was required to place him on probation. Relief was denied.

The defendant pled guilty to possession of narcotic drug, a class 4 felony. He argued under Proposition 200, he was entitled to probation regardless of his two previous convictions for possession of narcotic drugs for sale. The trial court disagreed with this argument, but deferred sentencing to permit the defendant to file a special action with the court of appeals.

In reviewing this case, the court of appeals first had to establish which version of A.R.S. § 13-901.01 applied to the question: the version enacted by the electorate through the passage of Proposition 200, or that enacted by the legislature through Senate Bill 1373. If the provisions of Senate Bill 1373 were in effect, the question would be easily answered since the defendant's priors would have been historical priors and would have probation.

However, the court noted that Senate Bill 1373 is the object of a referendum in the next general election, and therefore its provisions are suspended and inapplicable. The provisions of Proposition 200 are the applicable statutes.

Having decided that, the court of appeals then reviewed the two pertinent sections of A.R.S. § 13-901.01 which relate to this issue.

> A.R.S. § 13-901.01(C) provides: Personal possession or use of a controlled substance pursuant to this section shall not include possession for sale, production, manufacturing, or transportation for sale of any controlled substance.
>
> A.R.S. § 13-901.01(G) provides: A person who has been convicted three times of personal possession or use of a controlled substance as defined in section 36-2501 is not eligible for probation under the provisions of this section but instead shall be sentenced pursuant to the other provisions of chapter 34 of this title.

The defendant argued that since possession of narcotic drugs for sale was not outlined in section G, the court was required to place him on probation.

The court of appeals did not agree with the defendant's argument. It adopted a more common sense approach to reviewing the voters' intent in adopting Proposition 200. Their review indicated the voters

distinguished between personal use and possession for sale in determining who should have mandatory probation. Consequently, the court of appeals denied relief, lifted the stay, and remanded the matter for sentencing.

Bolton v. Superior Court in Maricopa County, 253 Ariz. Adv. Rep. 33 (1997) - Whether a defendant is entitled to be sentenced in accordance with A.R.S. § 13-901.01 will be determined by the court and not a matter of pleading or plea agreement. Drug priors do not need to be alleged by the prosecutor.

The defendant pled guilty to possession of marijuana. Although it was her third conviction for possession of drugs, the plea agreement stipulated to "mandatory probation." The trial court refused to ignore her prior convictions and stayed sentence to allow her to file a special action with the court of appeals.

In her special action, the defendant argued that a prior conviction exists for purposes of A.R.S. § 13-901.01 only if properly alleged by the state, similar to alleged prior convictions in A.R.S. § 13-604(P).

The court of appeals rejected her argument, concluding A.R.S. § 13-901.01 was unambiguous. Whether a defendant is entitled to be sentenced in accordance with A.R.S. § 13-901.01 will be determined by the court and not a matter of pleading or plea agreement.

Baker v. Superior Court in Maricopa County, 251 Ariz. Adv. Rep. 28 (1997) - A.R.S. § 13-901.01 became effective December 6, 1996. To be sentenced under this statute, the date of the offense must be on or after December 6, 1996.

Proposition 200, "The Drug Medicalization, Prevention, and Control Act of 1996," was passed by the voters in November, 1996. It became effective with the governor's signature on December 6, 1996. The provisions of this bill are contained in A.R.S. § 13-901.01 and stipulate any person convicted of personal possession or use of drugs shall be eligible for probation.

Baker was charged with possession of drugs committed on November 27, 1996. Sentencing occurred on February 6, 1997. Harris, also contained in this appeal, was charged with possession of drugs on June 24, 1996. The matter did not go to trial until January, 1997. Both defendants were allowed stays to appeal whether or not they fell under the provisions of Proposition 200 since they were convicted after the effective date.

The court of appeals held true to past decisions in which the applicability of a law is based upon the date the offense was committed. "We . . . conclude that section 1-246 controls the applicability of section 13-901.01 (A)."

Public Records

Bolm v. Custodian of Records of the Tucson Police Depart., 283 Ariz. Adv. Rep. 13 (1998) - law enforcement agency personnel and IAD records are subject to public records requests. These requests should be balanced on a case-by-case basis to determine if a particular record should be released. The trial court generally should conduct an in camera inspection for such requests.

Bolm requested all personnel records related to two TPD officers pursuant to A.R.S. §§39-121 and 39-121.01. This included hiring and training records, any evaluations, commendations, reprimands, compliments, complaints, and internal affairs documents. When TPD refused to release the IAD records and evaluations, Bolm filed a special action. The trial court subsequently concluded that the IAD records and evaluations were protected from publication, but that hiring records, commendations, and reprimands were not protected. Both parties appealed.

Under Arizona's Public Record Law, "public records and other matters . . . shall be open to inspection by any person." *Scottsdale Unified School Dist. V. KPNX Broadcasting Co.*, 191 Ariz. 297, 300, 955 P.2d 534, 537 (1998). In addition to specific statutes establishing exceptions, public inspection may also be curtailed in the interest of confidentiality, privacy, or the best interests of the state. If these interest outweigh the public's right to know, the government can refuse inspection. *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). However, the government has the burden of overcoming the presumption of disclosure. *Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993).

The court of appeals declined to establish a blanket rule protecting law enforcement agency personnel and IAD records from public records requests. These requests should be balanced on a case-by-case basis to determine if a particular record should be released. The court of appeals went on to agree with the city that the trial court generally should conduct an in camera inspection for such requests in accordance with *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984).

Restitution

General Principles

A.R.S. § 13-804 provides that upon the defendant's conviction for an offense in which the victim incurred economic losses, the defendant will be ordered to pay restitution for these losses. Economic loss is defined by A.R.S. § 13-105(11) as any loss incurred as a result of the offense and includes lost interest, lost earnings, and other losses that would not have been incurred were it not for the offense. Economic loss does not include losses incurred by the defendant, damages for pain and suffering, punitive damages or consequential damages.

The court will not consider the defendant's economic circumstances in determining the amount of restitution. However, the court will consider the defendant's economic circumstances in determining a payment schedule. A.R.S. § 13-804 (C) and (D) and *State v. Hovey*.

Only the court may set the total of restitution, but other court personnel may establish the payment schedule. A.R.S. § 13-804(D).

If more than one defendant has been convicted of the offense, they are jointly and severally liable for restitution. A.R.S. § 13-804(E).

If there is insufficient evidence to determine restitution, the court may hold a restitution hearing. A.R.S. § 13-804(F).

A restitution lien is created in favor of the victim or the state. A.R.S. § § 13-804(H) and -806.

The defendant, the state, or the victim may request a modification of the payment schedule. A.R.S. § 13-804(I).

According to *State v. Burton* the restitution:

1) makes the victim whole and rehabilitates the offender by making him or her accept responsibility for their actions.
1) is not meant to be punishment.

Victims, even if they appear to be contributory to their losses, are entitled to restitution. *State v. Clinton*

Leaving the scene of an accident charge did not warrant restitution because there was no showing that the crime caused the damages. *State v. Superior Court in Maricopa County*

Restitution liens may be filed by probation officers after the defendant has completed probation

and may be filed by probation officers. *State v. Pinto*

The court may add restitution after sentencing through modification if it was part of the original plea stipulations. *State v. Contreras*

The court may not order restitution for crimes in which there is no admission or adjudication of guilt or liability unless the defendant agrees to such in open court or plea agreement. *State v. Superior Court in Maricopa County, Maricopa County Juvenile Action No. JV-128676, State v. Reese,* State v. Monick, State v. Pleasant, *State v. Skiles, Maricopa County Juvenile Action No. JV-128676*

Restitution for losses not part of the crime may not be ordered. *State v. Whitney, State v. Skiles, State v. Pearce* and *State v. French*

Restitution may not be ordered for an offense the defendant told police he committed but for which he was never charged. *State v. Zierden*

Rehabilitative restitution is not dischargeable through bankruptcy. *State v. West* and *State v. Magnifico*

Restitution may be ordered for those who " . . . stand in the shoes of the victim," e.g., insurance companies and DES. *State v. Merrill, State v. Prieto*, *State v. Steffy* and *State v. Morris*

According to *State v. Phillips*, the amount of restitution must be outlined to the defendant in order for him to make a knowing decision to plead guilty. It may be outlined by:

1) The plea containing a specific amount.
1) A statement by the defendant to pay a specific amount.
1) A warning by the Court before the acceptance of the plea that the court may order restitution on a specific amount.

Plea agreements will be vacated if restitution amount is vague and it impacts on defendant deciding to plea. *State v. Crowder*. However, the plea agreement will be valid when the defendant should be aware of the amount of losses. *State v. Egwaoje* and *State v. Grijalba*

Restitution payments may begin while defendant is imprisoned. *State v. Moore*

Wages lost while voluntarily attending court hearings should be assessed as restitution. *State v. Lindsley*

Counseling for the victim, certain travel expenses, rental costs, costs for basic necessities of life, future medical costs resulting from the crime, the family's funeral and travel expenses, and customary and reasonable attorney's fees incurred to close the victim's estate are proper restitutionary items. *State v. Baltzell, State v. Morris, State v. Howard, State v. Wideman* and *State v. Spears*

The maximum amount of restitution is not limited by the charged offense. *State v. Francher*

Restitution is part of the sentence and must be imposed at the time of sentencing with the defendant present. *State v. Barrs* and *State v. Lewus*.

State v. Cohen, 298 Ariz. Adv. Rep. 18 (1999) - Companies suffer economic losses as a result of kickbacks. As a result, the defendant must pay restitution.

The defendant was convicted of several bribery and fraud charges involving paying kickbacks in order to get contracts. At trial, the state did not produce evidence of economic loss to the company. The defendant was placed on probation and ordered to pay restitution. The defendant appealed arguing that the company had no actual losses as a result of his kickbacks and there was no economic loss as proscribed in A.R.S. § 13-105(14). The defendant relied upon *State v. Barrett*, 177 Ariz. 46, 864 P.2d 1078 (App. 1993) in which the defendant used a bad check to rent a car and the victim claimed purported losses. In that case, the court of appeals declined restitution because the victim was speculating on his losses.

In this matter, the court of appeals reasoned that the company did suffer economic loss because other competitors might have delivered the same services at a lower cost. The conviction and restitution was affirmed.

State v. Proctor, 277 Ariz. Adv. Rep. 14 (1998) - The defendant cannot be ordered to pay restitution in uncharged counts or interest on the victim's losses.

The defendant was ordered to pay restitution for losses in uncharged counts. He appealed. The state contended that A.R.S. §13-804(A) allows the court to order a fine that may be allocated as restitution to any person who suffer a loss upon the defendant's conviction for that offense. While the court of appeals agreed with the state that A.R.S. §13-804(A) seems to envision a wider group of persons to whom a defendant may be ordered to pay restitution than A.R.S. §13-603(C), it held that case law firmly established that restitution can be ordered only in matters for which the defendant was convicted or agreed to pay restitution. That part of the restitution order was vacated.

The defendant also argued against the calculation of interest on the victim's losses. The court of appeals affirmed this.

State v. Lindsley, 252 Ariz. Adv. Rep. 46 (1997) - The defendant was ordered to pay restitution for a lost wallet she testified she took, but for which she was not charged. She was also ordered to pay restitution for the victim's lost wages for being at court. Both orders were affirmed.

The defendant found the victim's wallet which contained a number of checks. She was later arrested when her mother and a friend tried to cash one of the checks. The police located the defendant

waiting in the parking lot for the two to return. The victim's wallet and remaining checks were in the defendant's possession, along with a small amount of marijuana. She subsequently was found guilty of forgery, possession of marijuana, and possession of drug paraphernalia. As conditions of her probation, the defendant was ordered to pay restitution for some missing jewelry the victim claimed was in her wallet, the wallet itself, and the victim's lost wages for attending court hearings. The defendant appealed the restitution order.

In the appeal, both the defendant and the state agreed that restitution should not have been ordered for the missing jewelry. "While a trial court may impose restitution for crimes admitted by defendant but uncharged by the State, *State v. Cummings*, 120 Ariz. 69, 583 P.2d 1389 (App. 1978), no restitution may be imposed for an uncharged offense that has not been admitted by defendant and for which there is no supporting evidence before the trial court or for which the defendant has not agreed to pay restitution." See *State v. Zierden*, 171 Ariz. 44, 828 P.2d 180 (App. 1992); *State v. Scherr*, 101 N.W.2d 77 (Wis. 1960). The court of appeals agreed that restitution should not be ordered for this loss.

However, the court of appeals did find that the defendant should pay for the loss of the wallet. While it was true she was not charged with theft, she testified she possessed the wallet with the intent to deprive the victim of it, thereby admitting theft.

The court of appeals next addressed the issue of restitution for the lost wages for ordered and voluntary attendance at court. Reviewing *State v. Morris*, 173 Ariz. 14, 839 P.2d 434 (App. 1992), the court reiterated that recoverable economic losses are those that flow directly from or are a direct result of the crime committed. A necessary, but not sufficient, condition for determining payment of restitution is deciding whether "but-for" the offense, the victim would not have suffered the loss.

The defendant's argument rested with *State v. Wideman* , 165 Ariz. 364, 798 P.2d 1373 (App. 1990) in which the court of appeals refused to order restitution for travel expenses to voluntarily attend court hearings. In reviewing the current case, the court of appeals conceded that it found "*Wideman* impossible to reconcile with the restitution statute. . .." The travel expenses that were denied in *Wideman* were no less a direct consequence of the crime than the counseling costs that were approved. Moreover, the victim's voluntary attendance at court in the current matter was no less a direct impact of the crime than her ordered attendance. Were it not for the offense, she would not have been at court at all. To deny the victim restitution for lost wages for attending court hearings would be tantamount to denying the right to exercise her rights to attend all criminal proceedings as provided by the Victims' Bill of Rights.

The trial court's order for restitution for the wallet and lost wages was affirmed. The order for the lost jewelry was vacated.

State v. Superior Court in Maricopa County, 220 Ariz. Adv. Rep. 82 (1996) - As a traffic offense, leaving the scene charge does not warrant restitution for injuries caused by the underlying accident.

Severiano Martinez caused a traffic accident in which two people in the other vehicle were injured. Martinez left the scene. He was arrested and charged with leaving the scene of an accident. In city court, he pled guilty to leaving the scene (a criminal offense) and to unsafe turn (a civil traffic offense). One of the victim's insurance company requested restitution. The city court refused to order restitution. The state appealed to the Superior Court in Maricopa County. The superior court upheld the city court's refusal to impose restitution because there was no evidence that Martinez's leaving the scene caused or exacerbated any of the injuries. The state filed a special action.

The court of appeals upheld the city court's decision.

> "The plain language of both the constitutional and statutory provisions requires restitution only for losses caused by the criminal conduct for which defendant was convicted. None of the provisions mandate restitution for noncriminal acts committed by defendant. In fact, A.R.S. § 13-809 specifically exempts traffic offenses from those offenses for which restitution is required.

Referring to *State v. Skiles*, 146 Ariz. 153 (App. 1985), the court of appeals noted that none of Martinez's criminal conduct caused the injuries or resulted in any aggravation to the victim's injuries. The court of appeals did correct the city court's ruling that insurance companies were not proper parties for restitution. (*See State v. Blanton*, 173 Ariz. 517 and *State v. Merrill*, 136 Ariz. 300.)

Maricopa County Juvenile Action No. JV-132905, 221 Ariz. Adv. Rep. 21 (1996)

After the juvenile entered a plea agreement to pay restitution for damages to a vehicle he stole, he objected to the imposition of restitution noting the vehicle was already damaged when he took it. He appealed the restitution order.

The court of appeals noted this matter differed from *Juvenile Action No. JV-128676*, 177 Ariz. 352 (App. 1994) in which the juvenile was only a passenger in the stolen vehicle. In the present matter, the juvenile admitted the theft and acknowledged responsibility for restitution by signing the plea agreement. "Because the loss suffered by victim could have been inferred to have been caused by juvenile's admitted criminal conduct, because no credible evidence was submitted by juvenile to refute this inference, and because juvenile agreed to pay restitution for losses relative to his criminal conduct, we affirm the juvenile court's order of restitution."

State v. Spears, 908 P.2d 1062 (1996) - The family's funeral and travel expenses, and the 'customary and reasonable' attorney's fees incurred to close the victim's estate are proper restitution items.

The defendant was convicted by a jury of first degree murder and theft and sentenced to death. As part of the automatic review, the Arizona Supreme Court held that the trial court did not err in ordering restitution without a hearing for the victim's family's expense which included phone, probate attorney's fees, tax preparation fees, and funeral-related costs. "We believe that the family's funeral and travel expenses, and the 'customary and reasonable' attorney's fees incurred to close the victim's estate are proper restitutionary items."

The Arizona Supreme Court also reviewed the case for mitigating sentencing factors. The defendant was 33, so age was not a mitigating factor. The defendant's lack of a prior criminal history was appropriately considered as a mitigating factor. The defendant's difficult family background was given minimal weight. Support by his mother did not translate into a mitigating factor. His spotty employment record was correctly not considered while his military history had some mitigating value. Good conduct in court and while incarcerated did not have to be considered. Cooperation with law enforcement was properly not considered. The defendant's conviction was affirmed.

Maricopa County Juvenile Action No. JV131701 , 202 Ariz. Adv. Rep. 76 (1995) - In juvenile court, a victim may not testify over the telephone to report to the court economic losses at a hearing.

The juvenile was adjudicated delinquent based on her admission to a charge of attempted theft of an automobile. The plea agreement provided that she would pay restitution in an amount to be determined at a hearing. Since the victim had moved out of state, the court allowed the victim to testify over the telephone with the juvenile and counsel present. The court established restitution based upon this testimony. The juvenile appealed.

The court of appeals determined that since Rule 19.2 allows telephonic testimony only in dependency or termination of the parent-child relationship hearings, the juvenile court exceeded its authority in permitting telephonic testimony in this delinquency case. The restitution order was vacated and the matter remanded for a new restitution hearing.

State v. Clinton, 184 Ariz. Adv. Rep. 6 (1995) - Even if the victim contributes to the defendant's drinking which leads to her injuries, she is entitled to restitution when he pleads to aggravated assault.

The defendant was driving with the victim and drinking alcoholic beverages provided by the victim. He lost control of the vehicle causing an accident in which the victim was rendered paraplegic. The defendant pled guilty to aggravated assault and was placed on probation. The victim requested $44,000 in restitution. The trial court denied her request because it reasoned the victim was in part responsible for her injuries. The state appealed.

The court of appeals noted the Arizona Constitution provides the right to prompt restitution. "A crime victim retains victims' rights even if the facts suggest that the victim might be culpable himself." The only victims excluded from the Victims' Bill of Rights are those in custody for an offense or those who are the accused. Since A.R.S. § 13-603 and -804 " . . . make no mention of it, victim fault is not an issue in the restitution phase of a criminal case." The case was remanded for the trial court to order restitution to the victim.

State v. Tackman, 179 Ariz. Adv. Rep. 9 (1994) - judges of the superior court may appoint court commissioners, masters, and referees in their respective counties to determine restitution.

The defendant and his brother pled guilty to trafficking in stolen property. As part of the plea, they agreed to pay restitution not to exceed $2,000,000. The state prepared a restitution ledger totally $680,000. At the defendants' request, the trial court set a restitution hearing. Since the judge expected this hearing to be lengthy and involved, he appointed a commissioner as a special fact-finding master to conduct the hearing and report his findings to the sentencing court. The defendants requested a peremptory change of the commissioner. The trial court denied it, holding the commissioner was to act only as a fact finder and not as a judge and the challenges were inappropriate. The commissioner conducted the hearing over four days and reported his findings to the trial court. The defendant's brother objected to some of the finding which the trial court sustained. Restitution was set at $80,000. The defendants appealed challenging the trial court's ability to appoint a special master to handle the restitution hearing.

Relying upon Ariz. Const. Art. VI, § 24 and *Headland v. Sheldon*, 173 Ariz. 143 (1992), the court of appeals upheld the appointment. The Arizona Constitution provides that " . . . judges of the superior court may appoint court commissioner, masters, and referees in their respective counties, who shall have such powers and perform such duties as may be provided by law or rule of the supreme court." *Headland* further provides the court with " . . . inherent power and discretion to adopt special individualized procedures designed

to promote the ends of justice in each case that comes before them." The court of appeals also upheld the trial court's denial of a peremptory change of the commissioner.

State v. Pinto, Yazzie, Sehongva, and Capone, 179 Ariz. 593, 880 P.2d 1139 (1994) - A civil judgement can be entered if the defendant's probation expires with restitution still owing.

Each of the defendants was placed on probation and ordered to pay restitution. When the terms of their probations expired with their owing restitution, the probation officer filed petitions for entry of civil judgments against each defendant requesting that judgment be entered for the unpaid balance of restitution and costs. The defendants argued to dismiss the petitions because: (1) no rule existed permitting such a filing after probation expired; (2) the probation officer, not being an attorney, could not file such a petition; and (3) the court did not have jurisdiction because probation had expired. The trial court overruled these objections and issued the orders. The defendants appealed.

The court of appeals reviewed the applicable statute, A.R.S. § 13-805, which states in part that the court retains jurisdiction " . . . until paid in full, or until the defendant's sentence expires." The court of appeals noted that it was the legislature's intent to have restitution paid at the earliest possible date. If the court accepted an interpretation of the statute that relied upon which came first, payment in full or probation expiration, probationers would have little incentive to pay restitution and more incentive to pay nothing until probation expired and the court lost jurisdiction. This interpretation would frustrate the legislative intent. Accordingly, the court of appeals held that " . . . the trial court retains jurisdiction to modify the manner in which court-ordered payments are made until such time that the amount has been paid in full, or until defendant's sentence expires, whichever occurs last."

Again relying upon legislative intent, the court of appeals held that the " . . . trial court may consider a petition for entry of civil judgment which is filed within a reasonable time after the period of probation is completed. Determination of "reasonable time" was undefined. In addressing the question of the probation officer's authority to file such a petition, the court noted there are a number of rules that permit probation officers to file petitions. The court of appeals held that a " . . . petition pursuant to section 13-805 may properly be filed by an adult probation officer who is not a licensed attorney." The trial court's orders were affirmed.

The court of appeals went on to address a separate issue brought forward by one of the defendants involving the court's designation of the defendant's undesignated offense as a felony without granting the defendant a hearing on the matter. Relying on *State v. Benson*, 176 Ariz. 281 (1993), the court vacated the felony designation and remanded the case with directions to hold a designation hearing.

State v. Contreras, 165 Ariz. Adv. Rep., 180 Ariz. 450 (1994) - Restitution can be added after probation is granted.

The defendant entered a plea agreement which called for him to pay restitution. However at the time of sentencing, the victim had not responded to letters sent by the prosecutor or the probation officer. The trial court placed the defendant on probation. Several months later, the probation officer filed a petition to modify the conditions of probation to include restitution. The court held a restitution hearing which the victim attended. She noted that she did not recall why she had not responded to the letters. The trial court felt that the principles of fairness required the imposition of restitution and ordered it. The defendant appealed.

The court of appeals distinguished the present case from *Burton v. Superior Court*, 27 Ariz. App. 797 (App. 1977), in several areas. The first involved the defendant's agreement as part of the plea agreement to pay restitution in this case. *Burton* did not. The court of appeals, relying upon *State v. Foy*, 859 P.2d 789 (1993), felt that there are now Constitutional requirements to impose restitution. The trial court's order was affirmed.

Judge Noyes dissented in this 2-1 decision. He held that there was no distinction between this case and *Burton* and that the Victims' Rights Amendment did not authorize the court to change existing law regarding a trial court's jurisdiction on post-sentence restitution issues.

Maricopa County Juvenile Action No. JV-128676, 158 Ariz. Adv. Rep 8 (1994) - Juveniles cannot be ordered to pay restitution if the losses were not directly attributable to the offense.

The juvenile accepted a ride in a car stolen by another juvenile. When the stolen car was recovered, the victim sustained losses of personal property and damages to the car. At the time of the juvenile's adjudication for criminal trespass, the juvenile court held him to be jointly and severally liable for the damages and losses. The juvenile was ordered to pay restitution. The juvenile appealed.

The court of appeals applied the same logic to this juvenile matter as has been applied to adult cases involving restitution. The court held that since there was no evidence that the victim's losses directly resulted from the juvenile's criminal trespass, restitution could not be imposed. The state did not establish the losses were "directly attributable to the offense" or was something that would not have occurred "but for" the juvenile's conduct. The restitution order was vacated.

State v. West, 113 Ariz. Adv Rep 20 (1992) - A restitution order does not create a "debt" between the defendant and his victim and therefore is not dischargeable under bankruptcy law.

Before being convicted of fraud, the defendant was granted a declaration of bankruptcy which included losses suffered by some of the victims of his fraud. At the time of sentencing, the defendant was ordered to pay restitution to those victims whose losses had been included in his bankruptcy. Citing the United States Supreme Court ruling in *Kelly v. Robinson*, 107 S.Ct. 353 (1986), the court of appeals noted that restitution involving Chapter 7 is not a dischargeable obligation.

In *Kelly*, the restitution order was issued before the defendant filed for bankruptcy; however, the defendant sought to have the debt discharged by the bankruptcy court. The court held that the restitution order did not create a "debt" between the defendant and his victim which would be prohibited under bankruptcy law. The court of appeals employed the same logic to this case and upheld West's order for restitution.

State v. Inigues, 169 Ariz. 532 (1991) - The trial court is not precluded from ordering restitution simply because the victim received some compensation as a result of civil action. it should not order restitution exceeding the victim's actual economic losses after crediting payments received by the victim outside the criminal proceeding and pain and suffering allowances included in a civil matter should not be included when calculating what amount is for losses.

The defendant was ordered to pay $50,000 to the victim as a condition of probation. The defendant appealed the restitution order arguing that his civil settlement with the victim's family barred the court from ordering any restitution.

The court of appeals held that since restitution promotes rehabilitation and civil damage payments may not fully compensate the victim, the trial court was not precluded from ordering restitution simply because the victim received some compensation as a result of civil action. It further noted that restitution " . . . is not a claim which belongs to the victim, but a remedial measure that the court is statutorily obligated to employ." Relying on *State v. Howard*, 163 Ariz. 47 (App. 1989), the court of appeals reasoned that ". . . although the court must consider all economic losses of the victim under A.R.S. § 13-804(B), and must require the offender to make restitution in the full amount of economic loss . . . , it should not order restitution exceeding the victim's actual economic losses after crediting payments received by the victim outside the criminal proceeding." However, since civil settlements may include compensation for pain and suffering, not all of such a settlement may be assumed to pay for economic losses. Since the court of appeals could not determine in this matter how much of the insurance settlement was to cover economic losses and how much was for suffering, the matter was remanded to the trial court for such determination.

State v. Barrett, 152 Ariz. Adv. Rep. 37 (1993)- A restitution order based upon speculation of losses is inappropriate.

The defendant was sentenced to concurrent prison sentences following his plea to three counts of attempted fraudulent schemes. As part of his plea agreement, the defendant agreed to pay restitution to the victims. One of the victims, Pioneer Ford, claimed that the agency lost $1,500 to $2,000 profit on the vehicle the defendant bought with a bad check. Although the vehicle was recovered and returned in several weeks, the agency claimed that when the vehicle was sold, they sold it for no profit.

The court of appeals compared this case to *State v. Young*, 173 Ariz. 287, and found that the order for restitution was based upon mere speculation and vacated it. In requesting restitution, the state must show a causal relationship between the defendant's criminal action and the losses. In this matter, the victim did not demonstrate this or how the amount of losses was determined or that any even existed.

State v. Carbajal, 156 Ariz. Adv. Rep. 31 (1994) - Restitution cannot be ordered for victims' sorrow and neglect.

The court ordered the defendant to pay $25,000 in restitution to the victims for "their sorrow and their neglect" at the boarding house the defendant operated illegally. On appeal, the defendant maintained that the trial court had imposed restitution greater than the victims' losses.

In its review, the court of appeals noted the record indicated that the trial court imposed restitution to restore in part the victims' "sorrow and their neglect, other than what they paid out of pocket." Citing

A.R.S. § 13-105(12), the court of appeals remanded the matter of restitution to the trial court. While the record indicated that the victims remained entitled to losses based upon food, medication and attention they paid for but did not receive, the amount the trial court set included restitution for their pain and suffering which are precluded.

State v. Sexton, 148 Ariz. Adv. Rep. 19 (1993) - Losses due to increased insurance premiums are consequential and cannot be ordered as restitution.

The defendant was convicted of shooting at the front of a house where his estranged wife was staying. As a result of this action, the owners of the home lost their insurance coverage. They were able to obtain a new policy at a higher rate but the new policy did not include liability coverage. The defendant was subsequently placed on probation and ordered to pay restitution of $3,304 and " . . . any loss that occurs to the victims within the next three years that would have been covered under the old insurance policy, but not under the new policy." The defendant appealed the latter part of the restitution order claiming that these losses were consequential in nature and not subject to payment as economic loss.

The court of appeals concurred with the defendant. Referring to *State v. Morris*, 173 Ariz. 14 (1992), and *State v. Wideman*, 165 Ariz. 364 (1990), the court of appeals noted that this loss to the victim occurred because of the defendant, the insurance company, and future third parties who might be injured at the home of the victim. "If such a loss is not consequential damage of the type the legislature intended to exclude as the subject of restitution, it is hard to imagine what would be."

Vigliotto, In re, 148 Ariz. Adv. Rep. 63 (1993) - restitution does not abate upon the defendant's death. The state's lien against the estate was affirmed

Following the defendant's conviction, he was sentenced to 34 years in prison and fined $168,000 of which $42,739.09 was allocated to restitution as provided by A.R.S. § 13-803. Following the defendant's death, his estate appealed the payment of restitution noting that since it was a criminal matter and criminal actions abate upon the death of the defendant, it was improper for the court to allow the state's claim for restitution from the estate.

The court of appeals disagreed. Supported by *United States v. Dudley*, 739 F.2d 175 (1984), the court of appeals ruled that restitution, in its role of compensating a victim for losses, does <u>not</u> abate upon the defendant's death. The state's lien against the estate was affirmed.

State v. Foy, 147 Ariz. Adv. Rep. 91 (1993) - The court can add restitution after probation is granted. However, restitution for interest was inappropriate.

The defendant was convicted of theft and ordered to pay restitution. Several days later, the trial court modified the restitution order to include interest on the restitution amount. The defendant appealed contending the court lost jurisdiction to modify his sentence after formal pronouncement of the sentence and that interest was limited to interest lost by the victim, not post-judgment interest.

The court of appeals rejected the defendant's first argument explaining that it was the legislature's intent for defendants to pay all victims' economic losses resulting from the crimes, even if it means a

modification is required at a later date to reflect more accurately the victims' losses. However, the court of appeals agreed that restitution was to include only " . . . interest amounts previously agreed upon between the victim and defendant or a third party to which the victim would have been entitled and would have received but for the defendant's criminal conduct. It does not include interest imposed by the court on a restitution award in a criminal case." The order authorizing the payment of interest was vacated.

State v. Hovey, 140 Ariz. Adv. Rep. 24 (1993) - The court must consider the defendant's economic circumstances when ordering the payment schedule.

As a condition of probation, the defendant was ordered to pay restitution of $293,504 at $500 per month. The monthly payment schedule was to be reviewed yearly by the court. At the most recent review, the trial court increased the defendant's monthly payment schedule to $3,000 per month, despite the defendant's uncontested testimony that he was unemployed and owed $40,000 to the Internal Revenue Service. The defendant appealed claiming the court erred by not considering his economic circumstances in establishing the new payment schedule.

The court of appeals noted the trial court did <u>not</u> properly consider the defendant's economic circumstances when increasing the payments: thus abusing its discretion. The order increasing the payment schedule was vacated.

State v. Anderson, 143 Ariz. Adv. Rep. 24 (1993) - Settlement of a civil lawsuit may extinguish a defendant's restitution obligation to the extent that the settlement compensates the victim's family's economic loss.

Following the shooting of the victim, the defendant was charged with negligent homicide. One of the issues of his appeal was the court-ordered restitution. The defendant, referring to *Damron v. Sledge*, 105 Ariz. 151 (1969), claimed that because he entered a settlement with the victim's family, the order for restitution was improper. The defendant had agreed to an entry of a judgment of $200,000 against him for a wrongful death action in which the victim's family agreed that " . . . all restitution ordered by the court in the criminal action . . . is declared paid and satisfied."

The court of appeals ruled that the trial court had erred in summarily rejecting this settlement. "Settlement of a civil lawsuit may extinguish a defendant's restitution obligation to the extent that the settlement compensates the victim's family's economic loss." The court of appeals remanded this matter to the trial court to determine if the agreement extinguished the victim's right to restitution as the defendant claimed.

State v. Garcia, 136 Ariz. Adv. Rep. 10 (1993)

On appeal, the defendant challenged the court's order to pay restitution to two victims in dismissed matters. The state conceded that such restitution should not have been ordered in keeping with *State v. Pleasant,* 145 Ariz. 307 (1985). The restitution order was vacated.

State v. Blanton, 131 Ariz. Adv. Rep. 15 (1993) - Insurance companies take the place of victims after a settlement is reached and are entitled to restitution. The court's conclusion that "but for" the defendant's actions, the parents would not have incurred funeral costs supported the order for restitution.

The defendant pled guilty to negligent homicide, a class four felony. The court placed the defendant on probation and after conducting a restitution hearing, awarded restitution to the victim's insurance carrier which had settled with the victim's family for lost wages and to the parents for additional funeral costs not covered by insurance. The defendant appealed the restitution order, arguing that the insurance company was not a victim and that the family was not due restitution for additional funeral costs because these costs resulted from bereavement and religious practices of the victim's family and were therefore more in the nature of consequential damages.

The court of appeals reconfirmed its position that insurance companies take the place of victims after a settlement is reached and are entitled to restitution. *State v. Morris*, 106 Ariz. Adv. Rep. 45. Moreover, the court held that specific expenses are determined to be economic losses and therefore entitled to restitution if the court can determine "but for" the defendant's action, the expense would not have been incurred by the victim. In this case, the court concluded that "but for" the defendant's actions, the parents would not have incurred funeral costs. The restitution orders were upheld.

State v. Baltzell, 129 Ariz. Adv. Rep. 20 (1993) - The court may order restitution for the victim's funeral expenses, travel expenses for the deceased victim's daughter and son-in-law to travel to Arizona, lost wages while they were in Arizona and for attorney's fees in closing the victim's estate.

The defendant was found guilty of negligent homicide and reckless endangerment. He was ordered to pay restitution for the victim's funeral expenses, travel expenses for the deceased victim's daughter and son-in-law to travel to Arizona, lost wages while they were in Arizona and for attorney's fees in closing the victim's estate. The defendant appealed the order of restitution for lost wages, travel expenses and attorney's fees.

The court of appeals affirmed the restitution orders. It noted there was no error in awarding the travel expenses for the daughter's trip to Arizona, and since the court records were unclear as to whether or not the son-in-law was also needed to settle the victim's matters, it found no fundamental error. Similarly, since it was customary to employ an attorney to handle the victim's estate, attorney's fees were a reasonable part of restitution.

State v. Holguin, 138 Ariz. Adv. Rep. (1993) - After the defendant's probation was revoked and he was sentence to prison, the court could add to his prison sentence an order for restitution that was contained in the plea but the victim had not been able to report at the time probation was granted.

The defendant pled guilty to DUI, a class 5 felony, and was placed on probation. Although the plea agreement stipulated to payment of restitution of $5,000, none was imposed. Subsequently, the defendant's probation was revoked and the defendant received a prison sentence of two years. At the time of the probation disposition hearing, the court was able to determine that restitution of $4,736.18 was due the victim who had been out of the country at the time of the original sentencing. In addition to the prison term, the defendant was ordered to pay restitution to the victim and the insurance company. The defendant appealed

the order of restitution noting the court had failed to impose it at the time of the original sentencing and that the state had failed to appeal this decision. Thus the defendant argued, the court could not impose it later.

In its decision, the court of appeals stressed two other factors in the case. First, the defendant was aware of the victim's losses based upon the stipulations of the plea. At the original sentencing, the trial court noted restitution was due but no information was available. Secondly, the court of appeals relied on the fact that probation is a suspension of the imposition of the sentencing. If the conditions of probation are not met, the court may " . . . impose sentence, including such sanctions as it might have in the first instance." *State v. Muldoon*, 159 Ariz. 295 (1988). The court went on to note that " . . . to order probation is to suspend the imposition of sentence, a defendant whose probation has been revoked is essentially in the position of having never been sentenced. It follows then that the assessment of restitution at a sentencing proceeding after failure to complete a suspended sentence is appropriate." The court of appeals upheld the order of restitution.

State v. Lopez, 139 Ariz. Adv. Rep. 45 (1993) - The defendant can be ordered to pay a percentage of his income each month to pay restitution. When imposing an assessment, the court must make a factual finding that the assessment will not impose a hardship on the defendant or his family.

The defendant was granted probation and ordered to pay 25 percent of his net income each month to the probation department to pay for court-ordered payments. The defendant appealed this order claiming the payment schedule was imprecise and that the amount of payment was excessive.

The court of appeals upheld the 25 percent payment schedule noting " . . . A.R.S. § 13-808(A) does not require 'precise amounts'; it requires that payments be made in 'a specified period of time or in specific installments.' By ordering the defendant to pay 25 percent of his net income, the trial court clearly sets forth the necessary information for the defendant to calculate this obligation."

However, the court of appeals remanded for resentencing the part of the assessment levied for reimbursement for defense counsel because the trial court had not made a factual finding that the imposition of such would not create a substantial hardship to the defendant or his family as required in *State v. Miller*, 111 Ariz. 558,535P.2d 15 (1975).

State v. Freeman, 134 Ariz. Adv. Rep. 15 (1993) - Restitution does not create a legal title to property.

While incarcerated in the Department of Corrections, the defendant fraudulently obtained eight to ten credit cards with which he purchased property valued at $3,500. After an astute guard noticed the property, the defendant was charged with theft. The defendant was sentenced to an additional five years Department of Corrections and ordered to pay restitution. The defendant requested that he be allowed to keep any merchandise that the vendors would not take back since he would have paid for it through restitution. The court ordered that any merchandise not claimed by the victims be donated to the Red Cross. The defendant appealed saying he was entitled to the items because he was paying for them.

The court of appeals denied the defendant's claim to entitlement noting restitution was both reparative and rehabilitative in nature. Restitution does not create a legal title to property. The court of appeals directed that an effort be made to return the property to the merchants and credit the defendant for property returned to the victims. The trial court's order for unclaimed items to be donated to the Red Cross was vacated since it did not conform to A.R.S. § 13-3942.

State v. Steffy, 122 Ariz. Adv. Rep. 86 (1992) - Since the amount of restitution may not be increased after sentencing, the court must order all restitution at that time. The court is required to order restitution whether or not the victim requested such

The defendant appealed an order to pay restitution to a victim who had unpaid medical bills resulting from the defendant's crime. The victim was uncertain if all or part of the unpaid bills would be paid by his insurance company, which had not requested restitution. The court ordered the defendant to pay to the victim restitution including the total unpaid medical bills. The defendant appealed indicating the victim might have the entire amount of the bills paid by the insurance company which was not seeking restitution. Thus, it was conceivable the victim would be paid twice.

The court of appeals disagreed. It felt the defendant had to pay the total restitution but could seek a modification of the of the recipient (to the victim or the insurance company) if the bills were paid by the insurance company. Since the amount of restitution may not be increased after sentencing, the court must order all restitution at that time. The court of appeals went on to say that the court is required to order restitution whether or not the victim requested such. The appeal was denied.

State v. Barrs, 115 Ariz. Adv. Rep. 34 (1992)

The trial court forgot to impose $100.00 restitution at the time of sentencing but did include it in the sentencing minute entry. Relying upon *State v. Powers*, 154 Ariz. 291, the court of appeals determined that restitution was a required part of the sentence, but that it had to be imposed in open court with the defendant present. The matter was remanded for resentencing.

State v. Prieto, 109 Ariz. Adv. Rep. 34 (1992)

The defendant was sentenced to Department of Corrections after pleading to attempted child molestation and ordered to pay the Department of Economic Security (DES) $2,582 which the DES paid for psychological evaluation, counseling, and a parent aide for the victim and her mother. The defendant appealed the restitution order.

The court of appeals held DES was entitled to restitution. Similar to insurance companies, DES " . . . stands in the shoes of the victim because it is legally required to suffer the victim's own precise loss." *State v. Merrill*, 136 Ariz. 300. Restitution was affirmed.

State v. Zierden, 108 Ariz. Adv. Rep. 31 (1992) - the defendant's admission or confession to a police officer is not sufficient for a court to impose an order of restitution.

A jury found the defendant guilty of forgery and he was sentenced to prison. Additionally, the court ordered the defendant to pay restitution for an uncharged forgery that occurred at the same time and to which he admitted guilt to the police.

The court of appeals held that the defendant's " . . . admission or confession to a police officer is not sufficient for a court to impose an order of restitution. Ordering a defendant to pay restitution for a crime which he has not admitted in court poses the risk of serious due process error." Admissions obtained in court

are accepted under more stringent safeguards. "The admission must be in open court and on the record or in a writing prepared for filing with the court and signed by the defendant such as a plea agreement." The restitution order was vacated.

State v. Ellis, 108 Ariz. Adv. Rep. 28, (1992) - In general, the standard for assessing restitution for personal property is the fair market value of the property at the time of the loss, not its original purchase price.

In this matter, the trial court awarded restitution to the victim based on the purchase price of the lost personal property. The defendant appealed indicating the court should have considered the age of the items in setting restitution.

The court of appeals agreed, indicating that, in general, the " . . . standard for assessing restitution for personal property is the fair market value of the property at the time of the loss." While the court felt that " . . . in most cases, the fair market value of the victim's property . . . will realistically reflect the actual loss . . . this is not always the case." Noted exceptions were new cars, personal clothing and other items that depreciate drastically.

Judge Eubanks dissented believing this limited victim's restitution and was not the legislature's intent.

State v. Lewus, 105 Ariz. Adv. Rep. 36 (1992) - The court cannot imposed restitution by a minute entry.

The defendant pled to leaving the scene of an injury accident, a class 6 felony. As part of the plea, the defendant agreed to pay restitution of $3,000. At sentencing, the defendant felt *State v. Skiles*, 146 Ariz. 153, prohibited the court from imposing restitution for injuries since the defendant's charge was leaving the scene and no injuries were proven to result from the accident. A restitution hearing was set at which time both attorneys agreed the court could take under advisement whether or not restitution could be ordered. In a minute entry, the court ruled restitution could be imposed based upon *State v. Phillips*, 152 Ariz. 533, and ordered it at $2,470. The defendant appealed, arguing he had been denied his right to be present at sentencing because the court imposed restitution by a minute entry.

The court of appeals agreed, saying that since restitution is part of sentencing, the defendant has right to be present at such, and has right to contest the information to determine if restitution is warranted. The order for restitution in this matter was vacated and remanded.

State v. Morris, 106 Ariz. Adv. Rep. 44, (1992) - Restitution should be ordered as a rule for such basic "necessities of life" as shelter, food, transportation, and medical expenses including mental health costs (*Phillips*, *Wideman*) and costs to restore mental well-being and physical safety (*Brady*). Following this reasoning, the court upheld restitution for rental cars, taxi fares and telephone calls to the insurance company.

The defendant was charged with two counts of endangerment and was granted probation to include restitution to the victim and his insurance company. The defendant appealed, indicating restitution should not be paid to the insurance company or to the victim for rental cars, taxi fares or telephone calls to the Canadian insurance company.

The court of appeals confirmed restitution was due to the insurance company since it suffered

economic loss as a result of the defendant's criminal behavior. The court next reaffirmed " . . . that restitution is proper when the victim's losses are a direct result of the defendant's conduct, but not if the loss or damage does not flow from the conduct. We also find that the nature and character of the criminal activity may be additional factors in assessing restitution. Thus, . . . restitution should be ordered for actual damages, that are the natural consequences of the defendant's conduct or when the court determines that the losses were foreseeable, considering the nature and character of defendant's criminal actions." In summary, the court held that restitution should be ordered as a rule for such basic "necessities of life" as shelter, food, transportation, and medical expenses including mental health costs (*Phillips*, *Wideman*) and costs to restore mental well-being and physical safety (*Brady*). Following this reasoning, the court upheld restitution for rental cars, taxi fares and telephone calls to the insurance company.

State v. Brady, 98 Ariz. Adv. Rep. 32, 819 P.2d 1033 (1991) - Moving expenses, caused by threats from the defendant, were found to be directly attributable to the crime and not consequential damages.

The defendant pled guilty to two counts of sexual assault and was ordered to pay restitution for the victim's moving expenses. At the time of the assaults, the defendant threatened to return to the victim if she called police. After the assault, the victim began to receive unusual phone calls. She moved from the apartment where the assault took place because she feared the defendant would return and because the memory of the incident made remaining in the apartment stressful.

The court, citing *State v. Wideman* 165 Ariz. 364, found these moving expenses to be directly attributable to the crime and not consequential damages. Moreover, because of the threat, restitution was doubly warranted.

State v. Francher, 96 Ariz. Adv. Rep. 18, 818 P.2d 251 (1991) - In cases not involving plea agreements, the maximum amount of restitution is not limited by the charging document. Restitution is to make the victim whole, regardless of the limit of the dollar figure contained in the charging document.

The defendant was tried by the court and found guilty of criminal damage, a class 2 misdemeanor, originally charged as a criminal damage of more than $1,000 but less than $1,500, a class 6 felony. The defendant was granted probation and following a restitution hearing, restitution was ordered in the amount of $1,185. The defendant appealed, arguing that while the amount of restitution may be correct, restitution could not exceed $250 based upon the charge of which he was found guilty .

The court of appeals found that since this case did not involve a plea, *State v. Lukens* and *State v. Phillips* did not apply. Because " . . . restitution is neither punishment nor an element of the offense . . . the trial court has the authority to order restitution in full for damages caused by the criminal offense . . . It [restitution] is the act of restoring or making the victim whole and does not require proof beyond a reasonable doubt . . . so long as the due process considerations . . . are met, the trial court is obligated to order the defendant to pay full economic restitution to the victim." The maximum amount of restitution is not " . . . frozen by the charging document."

State v. Scroggins, 810 P.2d 631 (1991) - The amount of the victim's losses must be determined before the court can set an amount of restitution. Even though the drug charges were dismissed, the defendant can still

be ordered to pay a fine to the Drug Enforcement Fund.

Although the plea agreement stipulated that the defendant would pay restitution not to exceed $2,000, the presentence investigation did not provide in the investigation an amount of the victim's loss. Despite this, the court imposed the restitution amount of $2,000.

The court of appeals court held that this was improper because the victim's losses were never determined. The matter was remanded to the trial court for an evidentiary hearing to determine victim's losses. In this same case, defendant was ordered to pay a fine of $2,000 to Drug Enforcement as part of the plea and the corresponding drug charges were dropped. The defendant appealed the fine alleging she had been convicted of no drug charges. The court of appeals noted as a result of her felony conviction the defendant could be fined up to $150,000. The distribution of the fine did not affect the ability to impose it. The fine was upheld.

State v. Stapley, 808 P.2d 347 (1991) - Making partial payments of restitution does not have to be a written condition of probation. The defendant must make a good faith effort to pay restitution.

The defendant decided he was unable to pay monthly restitution of $418/month after his work schedule was cut in half, and consequently paid no restitution becoming $2,200 in arrears. The court found him in violation stating he could have made an effort to pay some part of the restitution and reinstated the defendant's probation. On appeal, the defendant claimed that such a requirement to make partial payments was an unwritten condition and he could not be found in violation.

The court of appeals did not concur with the defendant and upheld the violation indicating the defendant had made no "good faith effort" towards paying some part of the restitution and that it was not an "all or nothing" proposition.

State v. Howard, 91 Ariz. Adv. Rep. 52, 815 P.2d 5 (1991) - The victim's loss includes not only losses incurred at the time of sentencing, but also those losses reasonably anticipated to be incurred in the future as a result of the defendant's actions.

Defendant pled guilty to aggravated assault and was sentenced to eight years in prison and restitution of $128,000 which included $17,500 estimated for future medical care and $12,000 estimated for future lost wages. The defendant appealed claiming that future expenses are excluded by A.R.S. § 13-105(11) and is limited only to "incurred" economic losses.

The court of appeals affirmed the conviction and restitution order finding that " . . . the victim's loss includes not only loss incurred at the time of sentencing, but also those losses reasonably anticipated to be incurred in the future as a result of the defendant's actions."

State v. Wideman, 798 P.2d 1373 (1990) - Travel expenses for a murder victim's family to and from court are <u>not</u> a direct result of defendant's crime and are not appropriate for restitution. The family members were not required to attend any of the hearings. Costs for counseling to alleviate pain and suffering <u>are</u> economic loses and <u>are</u> appropriate for restitution.

Travel expenses for a murder victim's family to and from court are not a direct result of defendant's crime and are not appropriate for restitution. The family members were not required to attend any of the hearings. Costs for counseling to alleviate pain and suffering are economic loses and are appropriate for restitution. The plea was not involuntary because restitution was higher than the defendant wanted. Restitution was not a major factor in the plea, since the stipulated sentence reduced his possible imprisonment by half.

State v. French, 801 P.2d 482 (1990)

A motel owner tried to obtain restitution for cleaning the site where the defendant committed sexual assault. Restitution may not be ordered for matters other than the specific crime for which defendant was convicted or entered an agreement before the court to pay. The motel owner was not the victim of sexual assault and therefore not entitled to restitution.

State v. Ferguson, 798 P.2d 413 (1990)

A defendant may not be ordered to pay restitution to victims of crimes to which he was not convicted or agreed to pay restitution regardless of reviewing the ledger request. Further, the total restitution must account for items returned the victims.

State v. Maupin, 801 P.2d 485 (1990)

The court has the authority to order the defendant, as a part of the cost of prosecution, to pay the costs of extradition specifically as a fine for restitution A.R.S. § 13-804.

State v. Vera, 766 P.2d 110 (1989)

The court may order the defendant to pay restitution within two years of his release from Department of Corrections. If this seems unreasonable to the defendant, he may petition the court upon his release.

State v. Grijalba, 755 P.2d 417 (1988)

This case modifies *State v. Phillips*. Only in unusual cases is the precise amount of restitution relevant to the decision to enter a plea. "Clearly, *Lukens* and *Phillips* do not stand for the proposition that every plea is to be vacated if the defendant lacked any bit of information." The plea is to be vacated only if the restitution amount is relevant to defendant entering into it.

State v. Pearce, 751 P.2d 603 (1988)

The court of appeals did not believe victim is entitled to use the criminal justice system to enforce its lease contract to collect consequential damage even if stipulated in the plea agreement. *Breach of lease* and *lost profits* (emphasis added) are consequential damages which do not flow from the crimes and are not part of economic loss (A.R.S. § 13-105). An order of restitution does not preclude a separate civil action, where damages beyond the restitution amount may be sought.

State v. Moore, 754 P.2d 293 (1988)

Restitution payments may begin while defendant is imprisoned.

State v. Egwaoje, 749 P.2d 937 (1987)

The plea agreement was valid despite the fact that restitution amount was not included. Since the offense involved bad checks the defendant should have been aware of the approximate amount of restitution.

State v. Crowder, 747 P.2d 1176 (1987)

A plea agreement will be vacated when the unknown amount of restitution is a relevant factor if the defendant is to accept it intelligently and knowingly.

> While he [the defendant] may not have been told the precise amount, either the nature of the charges, the advantages of the plea bargain, the circumstances of the individual defendant, or the probable length of sentence will ordinarily make it very clear that the precise amount of restitution could have been a relevant factor in the decision-making process . . . . If the extended record or the very nature of the crime to which the plea is entered indicates the defendant was or should have been aware of the approximate amount of restitution to be imposed, then the relevance question will not even rise.

State v. Weston, 745 P.2d 994 (1987)

Restitution did not need to be included in plea agreement because the charge (criminal damage) had a statutory limit ($100) and defendant was told by the judge at time of his plea that restitution could be a condition of probation. In *Phillips*, the charge (leaving the scene of an accident) did not have a statutory limit.

State v. Phillips, 733 P.2d 1116 (1987)

The amount of restitution must be outlined to the defendant for him to make an intelligent plea by, 1) the plea agreement containing a specific amount, 2) a statement by the defendant to pay a specific amount, or 3) a warning by the judge prior to accepting the defendant's plea that he may order restitution in a specific amount. The court, not the probation department, must set amount of restitution.

State v. Fox, 738 P.2d 364 (1986)

Restitution is to be ordered in full without consideration of defendant's ability to pay; probation may be extended in undesignated cases for longer than the maximum of a misdemeanor and still be later designated a misdemeanor; probation officer may not but court may modify conditions to increase monthly restitution payments.

State v. Skiles, 704 P.2d 283 (1985)

Restitution to the victim of the accident could not be ordered as a fine in a case where defendant pled guilty to leaving the scene of an accident. No determination of fault was made. His crime, leaving the scene, occurred after the accident and did not aggravate the victim's injuries to warrant restitution.

State v. Whitney, 726 P.2d 210 (1985)

The court does not have authority to order restitution for damages which occurred after defendant stole a vehicle and became involved in traffic accident. The defendant pled to theft of a vehicle and did not agree to pay restitution to accident victim. Consequently, it is a civil court matter.

State v. Pleasant, 145 Ariz. 307, 701 P.2d 15 (1985)

A defendant may be ordered to pay restitution only on charges that he has admitted, on which he has been found guilty, or upon which he has agreed to pay restitution.

State v. Merrill, 665 P.2d 1022 (1983)

Insurance companies are to be considered victims for restitution purposes.

State v. Magnifico, Bkptcy 21 BR 800 (1982)

Restitution for rehabilitative purposes is not chargeable under bankruptcy.

State v. Monick, 611 P.2d 946 (1980)

An order of restitution to victim of unrelated crime to which defendant has neither admitted guilt, been adjudicated guilty, nor agreed to pay restitution is improper.

State v. Reese, 603 P.2d 104 (1979)

It is an abuse of discretion for sentencing judge to require restitution for a crime in which there is no admission or adjudication of guilt or liability, unless the defendant, in a plea agreement or otherwise, consents to such restitution.

State v. Burton, 558 P.2d 992 (1977)

Fifteen months after the defendant was granted probation, a victim made a restitution claim. Upon the county attorney's request, the court modified the defendant's probation to include restitution. In a special action, the court of appeals overturned this action citing " . . . where additional burdens are imposed on the probationer, such as additional restitution, as in this case, the record must contain evidence that the probationer violated a condition of probation upon which to base the burden." The issue of restitution was decided at the time of sentencing and nothing new -- no new event -- on the defendant's part warranted a modification or revocation.

Restoration of Rights

U.S. v. Geyler, 932 F.2d 1330 (9th Cir 1991)

The defendant was found guilty in federal court of possession of firearms by a convicted felon, after having obtained his restoration of civil rights through the state courts. The 9th Circuit Court of Appeals reversed the conviction citing " . . . a federal felon whose civil rights are restored pursuant to state law, like a state felon whose rights are so restored, is no longer considered as having been 'convicted' for purposes of the federal firearms law."

State v. Fierson, 705 P.2d 1338 (1985)

A prior conviction may be used to impeach despite restoration of civil rights.

Search and Seizure

General Principles

Probationers do not lose all their constitutional rights. The Fourth Amendment still applies. However, probationers have a lower "expectation of privacy" and all of the protections afforded to private citizens do not apply to probationers. *State v. Montgomery*.

A probation officer may, consistent with the Fourth Amendment, search a probationer's residence without a warrant provided there are "reasonable grounds." Probable cause is not necessary. *Griffin v. Wisconsin*.

Exigent circumstances allow immediate, warrantless searches when it reasonably appears that evidence may be removed or destroyed, before it can be secured by police. *State v. Stein*.

A warrantless search may be conducted when "special needs, beyond the normal need for law enforcement, make the warrant and the probable cause requirement impracticable." *New Jersey v. T.L.O.*

Imposition of the warrantless search provision is a valid condition of probation. A probation officer has the duty to determine whether a probationer is complying with the conditions of his/her probation. *State v. Turner*.

In order for a probation officer to avoid being used as an agent of the police ("stalking horse"), a probation officer must articulate that the primary motivation of a search is for a "probationary purpose" rather than a "police investigative purpose." *State v. Hill*.

A probation officer may authorize police to conduct a search on behalf of the probation officer, if there is a need because of distance or time. *State v. Montgomery*.

In re Roy L., 312 Ariz. Adv. Rep. 19 (2000)

After receiving reliable information that the juvenile was carrying a hand gun, a Phoenix Police Officer stopped him. When asked if he had a gun, the juvenile said yes. The officer found it in the juvenile's pants pocket. The juvenile was arrested. He was subsequently charged with minor in possession of a firearm and committed to the Arizona Department of Juvenile Corrections. The juvenile appealed, arguing the juvenile court should have suppressed all the evidence resulting from the illegal search.

The court of appeals denied the juvenile's appeal. It found the officer had reasonable cause to stop the juvenile, that the Miranda warning did not have to be issued until after the juvenile admitted he had the weapon and he was arrested, that the state did not have to prove that the weapon was operable and that there was no basis other than the juvenile's statements to believe his behavior was necessary for self protection. The adjudication and disposition were affirmed.

State v. Vera, 309 Ariz. Adv. Rep. 3 (1999) - Officers can stop a vehicle based solely upon seeing that it has a cracked windshield.

The officer stopped the defendant's vehicle because he saw that it had a cracked windshield. As a result of the stop, evidence was found that led to the defendant's indictment on 14 counts of possession of marijuana for sale. The defendant filed a motion to suppress the evidence based upon *United States v. Millan*, 36 F.3d 886 (9th Cir. 1994). The trial court agreed and suppressed the evidence. The state appealed.

The court of appeals noted that the United States Supreme Court has held since 1996 that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). The court of appeals went on to note that the defendant had ignored *Whren* and its impact upon *Millan*. The defendant also argued that there was no specific statute prohibiting a car from being driven with a broken windshield. The court of appeals cited Arizona Revised Statutes § 28-957.01(A) which requires a car to have an adequate windshield. The arresting officer had a legitimate reason to stop the defendant's vehicle to see if the windshield was adequate. And unlike *State v. Ochoa*, 112 Ariz. 582, 544 P.2d 1097 (1976) in which the vehicle was stopped to check on registration which can be detected only by stopping the vehicle, a broken windshield is an observable violation the officer can detect before stopping the vehicle. The trial court's ruling suppressing the evidence was reversed.

State v. DeCamp, 296 Ariz. Adv. Rep. 27 (1999) - Inadvertence is no longer an element of the plain-view doctrine.

Police officers observed a bong in the defendant's bedroom when they were allowed in the home by the defendant's mother to use the phone. The defendant was subsequently found guilty of drug charges. He appealed the convictions, asserting the trial court should have suppressed the evidence because the officers saw the drugs during an earlier unlawful protective search. The court of appeals upheld the conviction, holding that the officer saw the evidence when permitted in the home legally. That he saw it inadvertently did not matter. "In light of *Horton* [*Horton v. California*, 496 U.S. 128 (1990)] and consistent with *Apelt* [*State v. Apelt*, 176 Ariz. 349, 861 P.2d 634 (1993)], inadvertence is no longer an element of the plain-view doctrine."

State v. Omeara, 297 Ariz. Adv. Rep. 3 (1999) - 349 pounds of marijuana cannot be explained as an innocent rational activity, and therefore does not preclude an officer from reasonable cause for a search.

The defendant appealed the trial court's denial of his motion to suppress 349 pounds of marijuana that was found in the trunk of his car. He contended that in keeping with *State v. Magner*, 191 Ariz. 392, 956 P.2d 519 (App. 1998), each of the actions that prompted the officer to search his vehicle could reasonably be explained by innocent rational activities rather than infer criminal activity. The court of appeals concurred with the dissent in *Magner* that " . . . almost any factor short of a 10-pound bale of marijuana on the front seat of a vehicle may have an innocent explanation" and upheld the trial court's denial of his motion.

Beijer, v. Adams, 288 Ariz. Adv. Rep. 53 - Drug courier guidelines provided.

The defendant was stopped for a routine traffic citation. During questioning, the officer became suspicious because the defendant's behavior matched the profile of a drug courier. When the defendant consented to a search, the officer located a secret compartment containing cocaine. After the trial court granted a mistrial because evidence was admitted contrary to *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998) and denied the defendant's motion to bar a retrial, the defendant filed a special action.

The court of appeals provided guidelines as to what is or is not admissible evidence in "drug courier" type cases. Relief was denied.

State v. Soto, 287 Ariz. Adv. Rep. 58 (1999) - Warrant exceptions of inevitable discovery.

The defendant was charged with possession of 100 pounds of marijuana after a reliable source advised police of the defendant's activities. However, the trial court granted the defendant's motion to suppress the drugs as a result of an illegal search. The state appealed.

Officers may not enter a home without a warrant unless there are exigent circumstances, *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Exigent circumstances are defined as a response to an emergency, a "hot" pursuit, the probability of the destruction of evidence, the possibility of violence, the knowledge that a suspect is fleeing or attempting to flee, or a substantial risk to the persons involved or to the law-enforcement process if officers must wait for a warrant. *State v. Gissendanere*, 177 Ariz. 81, 83, 864 P.2d 125, 127 (App. 1994). Without such conditions or a warrant, the search is a violation of the Arizona Constitution. *State v. Bolt*, 142 Ariz. 260, 265, 689 P.2d 519, 524 (1984).

In this matter, officers had been sent to obtain a warrant while other continued surveillance on the defendant's residence. The officers decided that because of the number of people entering and leaving the residence, they had to secure it quickly. During this process, the officers observed some of the marijuana. They did not undertake the search until the warrant arrived. Reviewing the warrant exceptions of inevitable discovery, plain view and independent source which may "purge the taint of impermissible law-enforcement activity, causally disconnecting the acquisition of the evidence from the illegality," the court of appeals held that the evidence was untainted because a warrant had been obtained and the information for its issuance was from an independent source. The trial court's order was reversed.

State v. Flannigan, 281 Ariz. Adv. Rep. 30 (1998)

The defendant was convicted and sentenced for negligent homicide. On appeal, he argued that the police illegally obtained a sample of blood which indicated the presence of amphetamines.

The court of appeals reversed the conviction and sentence holding that there was no record that the defendant agreed to the blood test and absent consent, the officers had not gotten a warrant which would have taken an additional 15-minutes.

State v. Pettit, 280 Ariz. Adv. Rep. 12 (1998) - Pre-arrest Questioning

The defendant was stopped with his brother after an anonymous informer advised police that the

car they were driving contained drugs. The officers handcuffed both men and placed them in the back of the patrol car, aware that the brother was a violent felon. They then conducted a search of the vehicle which yielded a pound of methamphetamine. At the station, the officers continued their questioning of the defendant without providing him the *Miranda* warnings. The trial court found the search illegal and the evidence inadmissible. The state appealed.

Officers must administer *Miranda* warnings prior to conducting "custodial interrogations." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "Factors indicative of custody include: (1) whether the objective indicia of arrest are present, (2) the site of the interrogation, (3) the length and form of the investigation, and (4) whether the investigation had focused upon the accused." *State v. Stanley*, 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991). In this matter, the defendant was stopped at a service station by a marked police vehicle. In Arizona, roadside interrogation becomes custodial when the police have both reasonable grounds to believe that a crime has been committed and reasonable grounds to believe that the person they are questioning is the one who committed it. *State v. Tellez*, 6 Ariz. App. 251, 256, 431 P.2d 691, 696 (1967). In this matter, the officers did not have probable cause to arrest the defendant until they had completed the search. Therefore, they did not know that a crime had been committed or that the defendant had committed it. The trial court's suppression of the pre-arrest statements was reversed while the station house interview was correctly suppressed.

State v. King, 283 Ariz. Adv. Rep. 6 (1998) - An officer cannot extend his arm into a home to pull a suspect outside to make a warrantless arrest. A subsequent search based upon the arrest was reversed.

A police officer observed the defendant's wife having car trouble. She explained that she and her husband had argued and that he had pulled her out of the house but that she had gotten away and was driving to her mother's to stay. She indicated that she was not frightened of her husband and that she was not hurt. The officer decided to visit the defendant's home. There, he spoke with the defendant who remained inside his home, speaking to the officer through the opened door. The officer notified the defendant that he was under arrest for domestic violence. When the defendant said he wanted to make a call and turned to walk further into his home, the officer grabbed his arm and pulled him outside and handcuffed him. During a subsequent inventory of the defendant's belongings, a small amount of cocaine was found. The defendant was charged and sentenced for possession of narcotic drug. He appealed arguing that the officer intruded in his home to make a warrantless search.

The majority holding of the court of appeals agreed with the defendant. While the officer could execute a warrantless arrest outside the defendant's home, he could not do so inside. Reaching inside the defendant's home to grab him was an illegal intrusion. The majority noted that this case differs from those instances where officers respond to a domestic violence call. Here, no call was made, the victim stated she was not frightened and the exigence circumstance was created by the officer in announcing that he was arresting the defendant. He could have obtained an arrest warrant. The court reversed and remanded.

Judge Toci dissented, arguing that the Arizona Supreme Court has held that when a defendant attempts to flee, a warrantless entry into a home is justified if reasonably necessary to prevent the suspect's escape. *State v. White*, 160 Ariz. 24, 33, 770 P.2d 327, 337 (1989). Exigency in this case existed because physical harm and damaged can escalate quickly in domestic violence situations.

State v. Magner, 261 Ariz. Adv. Rep. 8 (1998) - Factors the arresting officer used to stop the defendant, in

their totality, did not give rise to a reasonable suspicion that the defendant was transporting drugs.

The defendant was stopped by a police officer for traveling 71 m.p.h. in a 65 m.p.h. zone. During the questioning of the defendant, the officer became suspicious that he was transporting drugs. When he asked the defendant if he could search the car, he denied him permission. The officer indicated he could not leave and summonsed a drug detection dog, which found marijuana in the car truck. The defendant was subsequently convicted and sentenced to prison. The defendant appealed, arguing the officer had no reasonable factors to suspect him of transporting drugs.

The arresting officer cited during his testimony that the reasons he suspected the defendant were: he was nervous and would not look at the officer; the defendant had his car registration on the seat next to him, causing the officer to believe he might have a gun in the glove compartment; the defendant was wearing a tie with blue jeans, leading the officer to believe he was trying to convince a casual observer that he was a traveling business man; he was coming from Tucson, a known drug source city; his car was dirty; and he had an overnight bag in the back seat rather than in the truck.

With a dissent, the court held that these factors did not create a totality of circumstances sufficient to create a reasonable suspicion for the officer. The court offered explanations for each of the factors which would not give rise to a reasonable suspicion that the defendant was transporting drugs. The court reversed the convictions.

In dissent, Judge Voss took exception with the court of appeals second guessing the testimony offered to the trial court.

State v. Bentlage, 263 Ariz. Adv. Rep. 30 (1998) - A third party may consent to a search only when the third party has common authority over or other sufficient relationship to the effects sought to be inspected.

The defendant was stopped for traffic violations. The officer learned the vehicle belonged to the passenger. He asked her if he could search the vehicle. She agreed. During the search, the officer found a small zippered case under the defendant's seat. Inside, he found methamphetamine. The defendant was convicted and placed on probation. He appealed his conviction, arguing the passenger did not have the authority to permit the search of his property.

A third party may consent to a search only when the third party has "common authority over or other sufficient relationship to the . . . effects sought to be inspected." *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996). During his testimony, the arresting officer acknowledged that he believed the zipper case to be the defendant's and that he did not ask the defendant to open it. The court of appeals concluded, "The search of the closed zippered case was thus nonconsensual." The convictions were vacated and the matter remanded.

Steven O., In re, 235 Ariz. Adv. Rep. 16 (1997) - The validity of the stop and the validity of the frisk are separate questions. Present case law does not authorize routine pat-down searches of persons simply because they have been detained by the police.

The juvenile was observed by undercover officers enter a house, return to the street, put something in his pocket, and looked around as if "he was trying to keep an eye on everything that was going on." When the officers approached, the juvenile began to walk away. One of the officers grabbed him by the arm. The juvenile pulled away. He was escorted to a patrol car where he was patted down. The officer discovered a pack of cigarettes, which he removed as contraband since it is a petty offense for minors to possess cigarettes. In the cigarettes, the officer found a substance later identified as methamphetamine. At the adjudication hearing before the juvenile court, the juvenile moved to suppress the evidence based upon an illegal search. The court denied the motion and adjudicated the juvenile delinquent. He appealed.

The court of appeals noted the issue centered upon two separate questions: Was the investigatory stop valid? And, was the protective frisk valid? "The prerequisite for conducting an investigatory stop is a reasonable suspicion that a person is engaged or about to engage in criminal activity; the prerequisite for conducting a protective frisk is a reasonable suspicion that the suspect may be armed and presently dangerous."

In this matter, the court of appeals held the investigatory stop was legal because the officer had acted upon his experience and specific "articulable" facts to form the belief that the juvenile was engaged in criminal activity.

However, the court of appeals held the juvenile court had erred in its assumption that a reasonable suspicion of criminal activity entitled the officer to conduct a protective search as well as detain the juvenile. "As we explained in *Pima County Juvenile Delinquency Action No. J-10362-01*, 181 Ariz. 375 (App. 1995), the validity of the stop and the validity of the frisk are separate questions. 'Neither *Terry* nor its progeny . . . authorizes routine pat-down searches of persons simply because they have been detained by the police.'"

The officer in this matter provided no objective facts or observations to support his belief that a pat-down was necessary.

> Appellant was not a known criminal, there was nothing suspicious about his attire, he made no threatening gestures, and the encounter occurred at midday on a public street. Because the State failed to present specific, articulable facts to support a reasonable suspicion that Appellant was armed and presently dangerous, we conclude that the State failed to establish the constitutional validity of subjecting Appellant to a protective search.
>
> The adjudication was reversed.

State v. Stricklin, 233 Ariz. Adv. Rep. 14 (1996) - It is not enough that it was 1:00 a.m. and that defendant's furtive behavior might have been peculiar or even suspicious to support a reasonable cause to stop the defendant.

A police officer observed the defendant peering around the corner of a closed business at 1:00 a.m. The officer stopped him, patted him down and thought he felt a weapon in his pocket. Instead, he found crack cocaine, some cash, and a pager. The defendant was convicted of possession of a narcotic drug. He

appealed, arguing the officer had no reasonable cause to stop him and the evidence should have been suppressed.

The court of appeals agreed. No crime had been reported to support the officer's stop of the defendant. "It is not enough that it was 1:00 a.m. and that [defendant's] furtive behavior might have been peculiar or even suspicious." Since the stop was not justified, neither was the search. The conviction was reversed.

State v. Gonzalez-Gutierrez, 231 Ariz. Adv. Rep. 6 (1996) - The defendant was stopped because he glanced at the officer's vehicle out of the corner of his eye, drove at the same speed as the rest of the traffic, moved slightly when the officer began following him, and the defendant and his passenger were Hispanic. Without more clearly articulated evidence, the pattern could not create a reasonable suspicion that defendant and his passenger were in the country illegally.

The defendant was charged with possession and transportation of marijuana for sale, after being stopped by the Border Patrol. He moved to suppress all evidence seized from his car, alleging an illegal search. The trial court denied this motion. The defendant was convicted. In a memorandum decision, the court of appeals upheld the trial court's denial of the defendant's motion to suppress and affirmed the convictions. The matter was appealed to the supreme court.

The supreme court observed that "an investigatory stop of a motor vehicle constitutes a seizure under the Fourth Amendment, but because such stops are less intrusive than arrest, they do not require the probable cause necessary to issue an arrest warrant. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Nevertheless, because Fourth Amendment protection is fully applicable to an investigatory stop, the 'totality of the circumstances' must provide 'a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411 (1981).

In *Cortez*, the Supreme Court established a two-part test for determining the legality of automobile stops. Under the first test, the court evaluates subjective elements that lead to the stop, such as the officer's experience. The second part requires that these circumstances support a justifiable suspicion, there must be some indicator that the subject was involved in criminal activity.

In the current matter, the defendant was stopped because he glanced at the officer's vehicle out of the corner of his eye, drove at the same speed as the rest of the traffic, moved slightly when the officer began following him, and the defendant and his passenger were Hispanic. In its ruling, the supreme court held that the officer needed more to accomplish a valid stop. "Without more clearly articulated evidence, the pattern could not create a reasonable suspicion that defendant and his passenger were in the country illegally . . . Were we to validate this stop, investigatory stops of substantial numbers of innocent people would be permitted merely on the basis of an intuitive hunch."

State v. Blackmore, 224 Ariz. Adv. Rep 7 (1996) - It was reasonable for the officer to detain the defendant since he was in the proximity of the crime location, there was little time elapsed from the time of the crime and the officer's detention of the defendant, and the duration of the stop.

A police officer was dispatched to investigate a burglary call in which the victims did not see the suspect, but heard him leave their home through an open window. When the officer arrived, he entered an alley where he saw the defendant sitting behind a dumpster. The officer drew his gun and ordered the defendant to the ground where he handcuffed the defendant. When a backup officer arrived, the arresting officer advised the defendant that he was being held for investigation of a burglary. The defendant indicated he had identification in his nearby car and consented to the officer getting it from the car. Inside the defendant's fanny pack inside the car, the officer found a small bag containing marijuana and methamphetamine. The defendant was arrested and read his rights. He acknowledged that the drugs were "pot and some crushed white cross."

At trial, the defendant moved to suppress all the evidence and his statements. The trial court denied this motion. On appeal, the court of appeal held the trial court erred in not suppressing the evidence.

Review of the matter was granted by the Arizona Supreme Court which concurred with the dissent opinion in the court of appeals. Its ruling held that it was reasonable for the officer to detain the defendant since he was in the proximity of the crime location, there was little time elapsed from the time of the crime and the officer's detention of the defendant, and the duration of the stop. The officer detained the defendant in a manner sufficient to protect the officer's safety until he concluded his initial investigation. He could not know if the defendant had committed the burglary or was armed. The defendant's detention was not seen as an unreasonable search and seizure. The court of appeals' decision was vacated and the defendant's conviction affirmed.

State v. Rogers, 225 Ariz. Adv. Rep. 42 (1996) - An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion that criminal activity is afoot.

Two police officers stopped the defendant because he emerged at night from behind some bushes in a darkened residential area, walked down the middle of the road, and stared at two other police officers as they conducted a traffic stop. As the officers approached the defendant, one held out his badge and said, "Police officers, we need to talk with you." The defendant turned and ran. During the pursuit, he dropped a baggie containing crack. He was arrested. The trial court granted the defendant's motion to suppress because it found the investigatory stop violated the Fourth Amendment. The court of appeals reversed in a memorandum decision. The Arizona Supreme Court granted the defendant's petition for review.

In its decision, the Arizona Supreme Court first looked to *Ornelas v. United States*, 116 S.Ct. 1657 (1996) to determine if the officer had made a stop. According to *Ornelas*, "In order for a police investigatory stop to occur, a person must reasonably believe, in view of all the circumstances surrounding the incident, that he is not free to leave." Given the facts in this case, the Arizona Supreme Court held that it was reasonable for defendant to feel that he was not free to leave.

Next the court determined whether the stop was legal. "An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion" that criminal activity is afoot . . . Here, the police said only that it was dark, that defendant and his companion emerged from behind some large bushes in a darkened residential area, and stared at the officers while they were making a traffic stop. This is insufficient justification for an investigatory stop." The memorandum opinion of the court of appeals was vacated and the

trial court's order of suppression was affirmed.

Mazen v. Superior Court in Maricopa County, 216 Ariz. Adv. Rep. 97 (1996)

Fire fighters were called to a fire in a commercial storage unit rented by Mazen. They forced open the door to extinguish a fire. When the fire was out, they observed growing marijuana plants and called the police. The investigating detective observed the plants from the outside through the open door. He seized them and subsequently arrested Mazen. When the superior court refused to dismiss the charges based upon a motion to suppress the evidence that was seized in violation of the Fourth Amendment, Mazen filed a special action.

The court of appeals could find no exigent reason the detective did not obtain a search warrant, since they had probable cause to do so. The matter was remanded to the trial court.

State v. DeWitt, 208 Ariz. Adv. Rep. 23 (1996) - "Search now, warrant later" theory held by some law enforcement agencies is disapproved.

A police officer apprehended two burglars in the defendant's home while the defendant was away. Entering the home to look for evidence of a burglary, the officer observed chemicals and laboratory equipment. He called his supervisor to confirm his belief that the equipment was for the manufacture of drugs. His supervisor arrived, but could not confirm his suspicions. The Drug Enforcement Bureau was called. When their agents arrived and entered the home without a warrant, they confirmed that the equipment was for manufacturing drugs. The defendant was eventually convicted and sentenced to prison. On appeal, the defendant contended the search by the Drug Enforcement officers was illegal and the evidence should be suppressed. The court of appeals confirmed the conviction. The defendant appealed to the Arizona Supreme Court.

The Arizona Supreme Court held that the confirmation search by the Drug Enforcement officers epitomized the "search now, warrant later" theory. In a four-to-one decision, the Arizona Supreme Court vacated the court of appeals decision and ruling allowing the evidence into trial and remanded the matter to the trial court.

State v. Duran, 185 Ariz. Adv. Rep. 52 (1995) - Conversations on cordless telephones are not within the protected category

The defendant was convicted of possession of marijuana for sale and sentenced to prison. On appeal, she contended the trial court erred by not suppressing evidence obtained from a search warrant based on a cordless telephone conversation. A police officer who lived nearby and was listening to a scanner radio intercepted a conversation in which the defendant talked about her drug sales. He then observed activities that corroborated his belief she was selling drugs and alerted the appropriate police agency who obtained a warrant to search her home.

Basing its decision upon *United States v. Smith*, 978 F.2d 171 (1992), the court of appeals held conversations on cordless telephones are not within the protected category because either the interception is of radio waves rather than actual utterances or the speaker has no reasonable expectation of privacy. The

conviction and sentence were upheld.

Pima County Juvenile Delinquency Action No. J-103621-01, 184 Ariz. Adv. Rep. 60 (1995) - Current case law does not authorize routine pat-down searches of persons simply because they have been detained by the police.

A police officer observed two juveniles sitting in a car at a parking lot. As he went by, he noticed unopened cans of beer on the floor. Because they appeared to be minors, the officer asked one of the juveniles to step out. The officer patted him down for weapons and found none. He did note something square in the juvenile's pocket and asked the juvenile what it was. The juvenile said it was a pager. When the officer asked if he could see it, the juvenile took it from his pocket, bringing with it a baggie of marijuana. The officer arrested the juvenile for possession of marijuana, but did not cite him for possessing the alcohol. The juvenile was placed on probation. He appealed, arguing the officer's detention and search exceeded standards set by *Terry v. Ohio*, 392 U.S. 1 (1968) " . . . because the officer observed no conduct by the minor and had no reason to suspect that any criminal activity might be afoot."

The court of appeals noted that under *Terry*, a police officer is permitted to conduct a limited search for weapons of a person who the officer reasonably believes is armed and dangerous and whom the officer reasonably suspects is, or is about to be, engaged in criminal activity. In this case, the arresting officer could not specify what the juveniles were doing that was suspicious. Although he initially reported it was because of the beer, he never questioned the juveniles about the beer or cited them for it. "Even assuming that the officer's initial detention of the minor was lawfully related to investigating the . . . alcohol, we are unable to conclude that the balance of the encounter was permissible. Under *Terry*, a police officer may lawfully pat down a person when the officer 'is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.'" In this matter, the officer " . . . patted down the minor as though it were simply a routine police procedure . . . Neither *Terry* nor its progeny, however, authorizes routine pat-down searches of persons simply because they have been detained by the police. One must not lose sight of the fact that, as the Supreme Court held in *Terry*, a pat-down search of a person based on reasonable suspicion is nevertheless a search within the confines of the Fourth Amendment. Furthermore, once [the officer] patted the minor down and learned that he had no weapons, he had no reasonable suspicion of any other activity that would justify his asking what the minor had in his pocket and asking to see it . . . A *Terry* search is limited to that necessary to discover weapons that might be used to harm the officers or others; it does not permit an officer to undertake a 'fishing expedition.'" The juvenile's adjudication was reversed and the case remanded.

State v. Serna, 139 Ariz. Adv. Rep. 29 (1993) - School security officers are representatives of the state and have to observe the Fourth Amendment rights.

The defendant, a high school student, was stopped by the school security officer following a fight on campus. The officer asked the defendant for his school I.D. While the defendant was locating it, the officer noticed a plastic bag in the defendant's pocket. When the officer asked for it, the defendant provided it. It was determined to contain cocaine. The defendant was subsequently convicted and appealed the legality of the search.

The court of appeals first determined that security officers were representatives of the state and

had to observe the Fourth Amendment rights. Secondly, the court of appeals went on to note that the officer acted reasonably in stopping the defendant. The search was determined to be reasonable since the defendant might have had weapons that had been used in the fight on campus. The conviction was upheld.

State v. Gissendaner, 141 Ariz. Adv. Rep. 43 (1993) - A warrantless entry into a dwelling to effect an arrest is unreasonable unless there are exigent circumstances requiring police to act before a warrant may be obtained. *State v. Love*, 123 Ariz. 157. The following are considered exigent circumstances: 1) response to an emergency, 2) hot pursuit, 3) probability of destruction of evidence, 4) the possibility of violence, 5) knowledge that a suspect is fleeing or attempting to flee, and 6) a substantial risk of harm to the persons involved or to the law enforcement process if police must wait for a warrant. *State v. Greene*, 162 Ariz. 431.

The defendant was involved in a domestic dispute with his wife which culminated with his hitting her and leaving the house. The investigating police officer learned that the defendant had gone to stay with a nearby friend. At the friend's home, the officer spoke to a seated individual through the open door without knocking or identifying himself as a police officer. The individual called to the defendant in a back room. The officer immediately entered the home and located the defendant. Underneath the defendant's clothes, the officer found drug paraphernalia. The defendant was placed under arrest. When the officer searched the defendant's wallet for identification, a quantity of amphetamines was found. The trial court suppressed the drugs as evidence, finding the search to be illegal. The state appealed this decision.

The court of appeals noted that a warrantless entry into a dwelling to effect an arrest is per se unreasonable unless there are exigent circumstances requiring police to act before a warrant may be obtained. *State v. Love*, 123 Ariz. 157. The Arizona Supreme Court has recognized the following as exigent circumstances: 1) response to an emergency, 2) hot pursuit, 3) probability of destruction of evidence, 4) the possibility of violence, 5) knowledge that a suspect is fleeing or attempting to flee, and 6) a substantial risk of harm to the persons involved or to the law enforcement process if police must wait for a warrant. *State v. Greene*, 162 Ariz. 431. The court of appeals found none of these circumstances existed in this case. The court of appeals upheld the trial court's order to suppress the evidence and remanded the case back to the trial court.

State v. Ayala, 146 Ariz. Adv. Rep. 55 (1993) - The officers' purpose was to speak with the defendant, not to search the premises.

Responding to an anonymous tip, police officers arrived at the defendant's house to question him regarding a burglary. They were met at the door by the defendant's 15-year-old brother. The detective asked the boy where his father was and was told that he had already left for work. The detective then asked for the boy's mother and was told that she was out but would return shortly.

The detective then asked the boy if the defendant was there and said that he needed to speak to him. The boy opened the door indicating to the officers to come in. The officers proceeded into the house and followed the boy down the hall toward the defendant's bedroom. The boy opened the bedroom door and the detective told the defendant that they wanted to question him about a particular burglary. The defendant confessed and showed officers where some of the stolen merchandise was hidden in the house. The defendant was charged with burglary, theft, and trafficking in stolen property. Following a suppression order, the charges were dismissed without prejudice. The state appealed.

The court of appeals reversed the trial court's decision to grant the motion to suppress, stating that it reasonably appeared the boy had common authority over the area which would render valid his consent to the officers' presence. The court of appeals noted that the officers' purpose was to speak with the defendant, not to search the premises.

State v. Cramer, 127 Ariz. Adv. Rep. 28 (1992) - The use of extra-sensory, non-intrusive equipment does not constitute a search for purposes of the Fourth Amendment.

The police used an infrared heat-seeking device in surveillance of the defendant's house to determine if the information they received about the defendant growing marijuana had any probability. The device showed an abnormal amount of heat coming from the defendant's home. In a subsequent appeal, the court noted that the U.S. Supreme Court has held that the utilization of extra-sensory, non-intrusive equipment does not constitute a search for purposes of the Fourth Amendment. *U.S. v. Place*, 462 U.S. 696.

State v. Vasquez, 807 P.2d 520 (1991) - The officer's search of the defendant's jacket pockets was lawful as a protective search for the officer's safety and the safety of those around them.

Officers were called to the scene of a domestic violence situation where they found the defendant and his wife who had been arguing. The officers separated them and because they had been drinking, agreed to drive the defendant home. When the defendant said he was cold, the officer asked if the defendant wanted to get his jacket from the defendant's car. The officer advised the defendant that he would have to search the jacket first. The defendant made no objection. Since it was a leather jacket and the officer could not tell if the pocket contained a weapon, he reached inside the pockets where cocaine was found. The officer's search of the defendant's jacket pockets was lawful as a protective search for the officer's safety and the safety of those around them.

State v. Stanley, 809 P.2d 944 (1991)

Where the defendant gave the keys to his business to his sister-in-law through his mother to search his business, that sister-in-law could voluntarily consent to let police search the business. "While giving keys to another is not a blanket authorization to enter the premises and authorize a search when circumstances dictate the propriety of doing so, common authority may properly be inferred, exercised and delegated to the police . . . ."

U.S. v. Cardona, 903 F.2d 60 69 (1st Cir. 1990)

Police officers did not violate the Fourth Amendment when they arrested without a search warrant a parolee in his home on an outstanding parole violation warrant. The police were acting in good faith as agents, and at request of parole authorities.

State v. Jeney, 163 Ariz. 293 (1989) - A protective sweep of the defendant's residence was proper because the officers reasonably believed an immediate danger to their safety existed.

Police officers received a tip from the "silent witness" program that the defendant was selling drugs from his apartment. A few days later the officers began a surveillance of the defendant's apartment. Prior to the surveillance, officers conducted a routine computer check of the defendant and discovered that he was on probation and that there were outstanding traffic warrants for his arrest.

After officers conducted surveillance for about an hour and one-half, they decided to arrest the defendant on the outstanding traffic warrants. When the defendant answered the door, an officer showed the defendant identification and told him he was under arrest. The officer saw someone sitting on the couch behind the defendant and immediately entered the residence in an effort to secure the arrest scene for the protection of all officers. Another person who was in the bathroom was secured. While an officer was talking to the persons on the couch, he noticed a burned marijuana cigarette nearby. When the defendant denied the officer's request to search the apartment, the officer contacted the defendant's probation officer. The probation officer's subsequent search revealed several controlled substances, including marijuana, weapons, ammunition, and assorted drug paraphernalia.

The defendant was convicted of possession of narcotic drugs and possession of drug paraphernalia. He was sentenced to imprisonment. The defendant appealed arguing that the search was "pretextual" in that police officers arrested him for minor traffic violations because they suspected him of more serious criminal activity, and therefore evidence seen during the arrest should have been suppressed. He also argued that since the officer admitted his normal duties did not include the execution of traffic warrants, such actions by the officer were a "subterfuge" used to allow officers to enter the apartment. Finally, he contended that a search of his home incident to a misdemeanor traffic violation violated his right to privacy under the Arizona State Constitution.

The court of appeals affirmed the conviction and sentence. They noted that the officers were acting with the "authority of law" and therefore did not violate the defendant's privacy under the Arizona State Constitution, adding that a protective sweep of the defendant's residence was proper because the officers reasonably believed an immediate danger to their safety existed. Also the court of appeals found that regardless of the officers' subjective intent, the defendant's arrest was appropriate because the defendant was arrested on valid warrant.

State v. Stein, 153 Ariz. 235 (1987) - Exigent circumstances allow immediate, warrantless searches when it reasonably appears that evidence may be removed or destroyed, before it may be secured by the police.

United States customs officers opened two packages in New York and discovered about 1.5 pounds of heroin. Customs officers inserted a beeper to track the packages. Arizona Department of Public Safety officers in Yuma, Arizona conducted surveillance on the house where the package was delivered. They became concerned that the defendant would, upon receipt of the packages, discover the beeper and subsequently destroy the evidence. DPS officers then entered the residence moments before a Yuma County magistrate had signed a search warrant.

The court of appeals affirmed the defendant's convictions for importation of heroin and other offenses stating that exigent circumstances allow immediate, warrantless searches when it reasonably appears that evidence may be removed or destroyed, before it may be secured by the police.

Griffin v. Wisconsin, 107 U.S. S. Ct. 3164 (1987) - A probation officer may, consistent with the Fourth Amendment, search a probationer's residence without a warrant, provided there are "reasonable grounds" (not probable cause).

On April 5, 1983 a detective of the Beloit (Wisconsin) Police Department, contacted a probation officer's supervisor after he was unable to contact the defendant's probation officer. The detective informed the supervisor that he had received information that guns might be in the defendant's apartment. The supervisor, unable to reach the assigned probation officer, went to the apartment accompanied by another probation officer and three plainclothes police officers. During the subsequent search, executed entirely by the probation officers under the authority of Wisconsin's probation regulation, officers located a handgun.

The defendant was charged with possession of a firearm by a convicted felon. The defendant moved to suppress the evidence seized during the search. The trial court denied the motion, concluding that the search was reasonable and no warrant was necessary. The defendant was convicted by a jury of the firearms violation and sentenced to two years' imprisonment. The conviction was affirmed by the Wisconsin Court of Appeals. On further appeal the Wisconsin Supreme Court also affirmed.

The U.S. Supreme Court also affirmed the conviction stating that a probation officer may, consistent with the Fourth Amendment, search a probationer's residence without a warrant, provided there are "reasonable grounds" (not probable cause).

New Jersey v. T.L.O., 105 U.S. S. Ct. 733 (1985)

A warrantless search may be conducted when, according to the U.S. Supreme Court, " . . . special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

State v. Turner, 688 P. 2d 1030 (1984) - The search was not rendered invalid by the presence of police nor by the fact that the probation officer was aided by police in the opening of the bags. The imposition of the warrantless search provision was a valid condition of probation, and the probation officer has a duty to determine whether a probationer is complying with the conditions of his/her probation.

Police officers' initial warrantless seizure of defendant's luggage following his arrest on outstanding warrants for traffic violations was based on probable cause. Police based their probable cause on the following evidence: the defendant had been involved in a traffic accident and appeared to be under the influence of some intoxicant; a witness had informed police that the defendant had attempted to have him "stash" something; and the fact that the defendant had sought to leave the scene of the accident in order to dispose of a canvas bag, that according to a witness, felt like it contained flour. Police contacted the defendant's probation officer, who accompanied by another probation officer, traveled to the scene and conducted a search of the defendant's vehicle in accordance with terms and conditions of probation. Police officers assisted in the search, and discovered a substance that was later identified as cocaine.

The defendant was convicted of unlawful possession of cocaine and transportation of cocaine. He appealed the conviction, contending that the detention of his luggage by the police, was illegal because they lacked probable cause. The defendant also asserted that the warrantless search by probation officers was rendered improper by the degree of involvement of police in the situation.

The court of appeals affirmed the defendant's conviction, finding that the search was not rendered invalid by the presence of police nor by the fact that the probation officer was aided by police in the opening of the bags. The court of appeals held that the imposition of the warrantless search provision was a valid condition of probation, and that a probation officer has a duty to determine whether a probationer is complying with the conditions of his/her probation.

State v. Hill, 136 Ariz. 347 (1983) - It is impermissible for police to use probation officers as a pretext for conducting a criminal investigation as "a stalking horse." The probation officer must be able to articulate that the primary motivation for a search is for a "probationary purpose" rather than a "police investigative purpose." Nothing precludes mutually beneficial cooperation between probation officers and police officers.

After Hill and codefendant Lopp's motion to suppress physical evidence and statement obtained during a search was granted by the trial court, the state appealed. The court of appeals reversed the earlier ruling given the following evidence: the probation officer would not have entered the residence unless accompanied by police detectives, due to a report that the probationer and other occupants possessed a gun; the probation officer actively participated in the search of the residence; and the probation officer made it a policy to follow up any leads he received concerning his clients. The court of appeals held that, based upon the evidence, the probation officer was himself interested in the search and that his presence was not in any way mere pretext for conducting criminal investigation by police officers, despite the fact that police officers may have had independent motive for searching his residence.

The court of appeals held in the written opinion that " . . . it is impermissible for police to use probation officers as a pretext for conducting a criminal investigation . . . as a stalking horse." The probation officer must be able to articulate that the primary motivation for a search is for a "probationary purpose" rather than a "police investigative purpose." Nothing precludes mutually beneficial cooperation between probation officers and police officers.

State v. Jeffers, 116 Ariz. 192 (1977) - Probable cause is not a constitutional prerequisite to a probation officer's search of person or property on a probation visit, rather, it is necessary to perform his/her duties properly. Police officers may accompany a probation officer to provide protection or to expedite the probation officer's search, but under no circumstances should a probation officer become a "stalking force" for police, thereby rendering the probation system a subterfuge for criminal investigation.

Two Pima County probation officers went to a defendant's residence to conduct a search, based on information from another probationer that there was heroin and stolen property in the residence. The defendant's conditions contained a search clause requiring him to "submit person and property to search and seizure at any time of the day or night when so requested by a Probation Officer, with or without warrant and with or without probable cause." For safety reasons, deputy sheriffs accompanied the probation officers and waited outside the residence.

Initially, a young woman answered the door and advised the probation officers that the defendant was not home. The probation officers identified themselves stating that they " . . . needed to come in and look at the residence at that time." The woman stepped aside and the officers entered the living room where they observed several television sets, stereo equipment, tires, and three or four golf bags. The defendant then entered the room and the officers began to question him. At that time the deputies entered and an extensive

search of the residence was conducted. Additional television sets, stereo equipment and marijuana were also located. The defendant was placed under arrest; later he was found guilty of receiving stolen property and possession of marijuana, and was sentenced to prison. In addition, his probation on a forgery conviction was revoked and another concurrent prison sentence was imposed. The defendant appealed the legality of the warrantless search of his premises while on probation.

The court of appeals affirmed the trial court's decision, but found that the portion of the search that took place without notice to the probationer, was invalid. However, the court of appeals ruled the portion of the search in which the defendant was present was valid, and that the evidence obtained during the search was not limited to proceedings revoking probation.

The court of appeals determined that probable cause is not a constitutional prerequisite to a probation officer's search of person or property on a probation visit, rather, it is necessary to perform his/her duties properly. The court of appeals stated that when a condition of probation requires the probationer to submit to a warrantless search "whenever requested" so as to thus render invalid any search made without a probationer's knowledge, notice given to a third party does not satisfy the notice requirement.

The court stated that police officers may accompany a probation officer to provide protection or to expedite the probation officer's search, but under no circumstances should a probation officer become a "stalking force" for police, thereby rendering the probation system a subterfuge for criminal investigation.

State v. Montgomery, 115 Ariz. 583 (1977) - The probation condition to search and seize is not unconstitutional. If there is a need because of distance or time, the probation officer may authorize police to conduct a search on behalf of the probation officer, adding that such authorization should be given sparingly.

As part of the defendant's conditions of probation, he was ordered to "Submit to search and seizure of person or property at any time by any police or probation officer without the benefit of a search warrant." The defendant appealed contending this condition was constitutionally over-broad and a violation of his Fourth Amendment right to be free from unreasonable searches and seizures.

The court of appeals upheld the probation condition. The court of appeals also stated that if there is a need because of distance or time, the probation officer may authorize police to conduct a search on behalf of the probation officer, adding that such authorization should be given sparingly. The court of appeals also noted that probationers do not lose all their constitutional rights and the Fourth Amendment still applies. *Griffin v. Wisconsin*, 107 U.S. S.Ct. 3164. However, probationers have a lower "expectation of privacy" and all of the protections afforded to private citizens do not apply to probationers.

State v. Dugan, 555 P.2d 108 (1976)

The defendant's mother gave officers permission to search the vehicle she was driving which the defendant owned. The court ruled she had legally consented to allow the vehicle to be searched and the defendant's subsequent conviction was upheld.

State v. Moreno, 556 P.2d 14 (1976)

The defendant's father allowed police to enter the defendant's bedroom in the family home, where stolen property was discovered. Court ruled consent was legally given by father since defendant was not a tenant and had never excluded anyone from the room.

State v. Patricella, 510 P.2d 39 (1973)

Following the defendant's arrest, his stepdaughter, who was not part of those arrested but was a renter who also occupied the apartment where the defendant lived, provided the police with the lock combination to a shed where the defendant had hidden stolen property. The court determined that she had provided in " . . . unequivocal words or conduct expressed consent to search" and ruled the search as a legal, consented search even though it was not the defendant who had given the consent.

Sentencing

State v. Garza, 273 Ariz. Adv. Rep. 32 (1998) - A.R.S. § 13-708 does not necessarily presume prison sentences will be consecutive, rather it is a default designation when a judge fails to specify.

The trial judge sentenced the defendant to consecutive sentences stating he felt the sentences were harsh but that he was required to by A.R.S. § 13-708 which he interpreted contained a presumption that a defendant convicted of multiple charges should serve consecutive sentences. The defendant appealed. The court of appeals concurred that A.R.S. § provided a presumption that sentences will run consecutively.

The Arizona Supreme Court held that the statute simply created a default designation applicable when a judge failed to specify whether the sentences should be consecutive or concurrent as reasoned in *State v. Fillmore*, 187 Ariz. 174, 927 P.2d 1303 (App. 1996) and *State v. Alcorn*, 136 Ariz. 215, 665 P.2d 97 (App. 1983). The court vacated the sentences and remanded to the trial court.

State v. Ariz. Dept. Of Corrections, 231 Ariz. Adv. Rep. 9 (1996) - *Tarango* was to be applied to all cases sentenced under § 13-604.

In a special action, the supreme court was asked to clarify whether its opinion in *State v. Tarango*, 185 Ariz. 208 (1996) was to be applied by the Department of Corrections retroactively. In *Tarango*, the supreme court " . . . held that when the State seeks enhanced penalties for dangerous or repeat offenders under A.R.S. § 13-604, that section, with its exclusive penalty provisions, explicitly provides the sentencing scheme. Therefore defendants sentenced pursuant to §13-604 are entitled to the parole eligibility provisions of that statute."

The supreme court went on to hold that *Tarango* was to be applied to all cases sentenced under §13-604. "To hold that §13-604 meant something different for inmates sentenced prior to *Tarango* would be a logical impossibility . . . The Department of Corrections shall continue to reclassify the parole eligibility of all inmates sentenced under A.R.S. § 13-604."

State v. Scott, 216 Ariz. Adv. Rep. 100 (1996)

The defendant was convicted by a jury of sale of cocaine. The court decided the amount surpassed the threshold amount, precluding probation. The defendant appealed his prison sentence. The court of appeals held that "the factors influencing the grant or denial of probation have historically been determined by the trial court at sentencing." *State v. Becerra*, 111 Ariz. 541. The finding of threshold amount was appropriately found by the trial court. The conviction and sentence were affirmed.

State v. Hardwick, 203 Ariz. Adv. Rep. 5 (1995)

The defendant was convicted of child molestation by a jury. The trial judge aggravated one of the prison sentences because there was no contrition. The court of appeals held "a convicted defendant's decision not to publicly admit guilt is irrelevant to a sentencing determination, and the trial court's use of this decision to aggravate a defendant's sentence offends the Fifth Amendment privilege against self-incrimination." See *State v. Holder*, 155 Ariz. 80, 745 P.2d 138 (App. 1987). The convictions and sentences were reversed.

State v. Barger, 810 P.2d 191 (1990)

The defendant was convicted of aggravated assault while on parole. Even though the court felt a life sentence without parole for 25 calendar years was inappropriate, it had to impose such since the prosecutor chose to file A.R.S. § 13-604.02 against the defendant.

State v. Waits, 786 P.2d 1067 (1989)

A life sentence with a minimum of 25 years for selling $20 of cocaine while on probation is constitutional.

Sex-Offenders

General Principles

Sex offenders are required to register and notify the sheriff of changes of address in accordance with A.R.S. § 13-3821.

Sex offenders whose offenses occurred are required to register. The statute is not an unconstitutional ex post facto law when applied to these defendants convicted after the enactment of the statute for offenses predating the enactment of the statute. *State v. Nobel*

Defendants convicted of "attempted" sexual offenses are required to register as sex offenders and such a lifetime requirement is not "cruel and unusual punishment." *State v. Lammie*, *State v. Cory*

Sexually Violent Persons Act

Martin vs. Reinstein, 295 Ariz. Adv. Rep. 21 (1999)

In a special action, defendants challenge the constitutionality of Arizona's Sexually Violent Persons Act (SVP), alleging that it violates constitutional prohibitions against ex post facto laws and double jeopardy, denies equal protection and due process, impermissibly chills free speech, violates separation of powers and is vague and over broad.

The court of appeals denied relief, basing its holdings on the fact that the statutes are civil in nature and not criminal.

Rineer v. Leonardo, 292 Ariz. Adv. Rep. 13 (1999) - Since the rape statute was not among those outlined in the SVP statutes, the defendant was not subject to the provisions of those statutes.

The defendant was convicted of rape. After completing a prison sentence, the Pima County Attorney filed a petition for his detention pursuant to Sexually Violent Predators (SVP) statutes, A.R.S. §§ 13-4601 through 13-4613 (1996). The defendant filed a motion to vacate the order for a mental health examination which the trial court denied. The defendant refused to cooperate with the examiner and was sentenced to jail for two years for contempt. The defendant filed a special action which the court of appeals declined. The Arizona Supreme Court accepted jurisdiction.

The court held that since the rape statute was not among those outlined in the SVP statutes, the defendant was not subject to the provisions of those statutes. The trial court's order was reversed and the matter remanded.

Community-Notification

Arizona Department of Public Safety v. Superior Court, 257 Ariz. Adv. Rep. 14 (1997) - The notification

statute is to be applied retroactively.

Kenneth Falcone and Harry Brumett were convicted of sex offense against children prior to June 1, 1996, the effective date for Arizona's 1995 sex-offender community-notification statute. Both Falcone and Brumett filed a motion to declare the provisions of the notification statute *ex post facto* and that they should be suspended in their cases. Judge Dann concluded the statute was *ex post facto* and should not apply to either petitioners. The Department of Public Safety, Department of Corrections, and the Maricopa County Adult Probation Department filed a special action with the court of appeals.

The court of appeals found the notification statute to be retroactive, but that it did not violate the *ex post facto* clauses of the Arizona or U.S. Constitutions because " . . . the overriding purpose of the community-notification statute is protecting the community from sex offenders, a purpose unrelated to punishing Falcone and Brumett." The court of appeals remanded the matter to the trial court.

Registration

State v. Cameron, 215 Ariz. Adv. Rep. 26 (1996) - Conviction for a misdemeanor sex offense requires registration.

The defendant was convicted in city court of public sexual indecency. The court ordered him to register as a sex offender pursuant to A.R.S. § 13-3821. After appealing to the superior court, the defendant

appealed to the court of appeals. He argued that such registration for a misdemeanor is cruel and unusual punishment and a ban on his travel. The court of appeals upheld the conviction and the order to register as a sex offender.

State v. Nobel, 171 Ariz. 171, 829 P.2d 1217 (1992) - Arizona's sex offender registration statute is regulatory in nature and not an unconstitutional *ex post facto* law when applied to these defendants convicted after the enactment of the statute for offenses predating the enactment of the statute.

The Arizona Supreme Court reviewed *State v. Nobel* ,167 Ariz. 440, and *State v. McCuin*, 167, Ariz. 447 in which two different panels of the court of appeals offered opposing opinions on whether sex offenders convicted before the registration was enacted had to register as sex offenders. The Arizona Supreme Court concluded " . . . Arizona's sex offender registration statute . . . is regulatory in nature and not an unconstitutional ex post facto law when applied to these defendants convicted after the enactment of the statute for offenses predating the enactment of the statute." The defendant was required to register.

State v. Lammie, 793 P.2d 134 (1990)

Defendants convicted of "attempted" sexual offenses are required to register as sex offenders and such a lifetime requirement is not "cruel and unusual punishment."

State v. Cory, 749 P.2d 937 (1988)

Although defendant pled guilty to attempted sexual assault, he is required to register as a sex offender. A condition of probation as such is appropriate.

Time in Custody

General Principles

A.R.S. § 13-709(B) provides that all time spent in custody pursuant to an offense shall be credited against the term of imprisonment.

Time spent on probation or in a treatment program as a term of probation is not to be given as time in custody. *State v. Benton*, *State v. Reynolds*, and *State v. Vasquez*.

If defendant is released on a new charge, but retained in jail for probation violation, the defendant is not to be given presentence incarceration credit for the new charge following the release order. *State v. San Miguel.*

In aggravated DUI cases, the court may credit presentence custody time to the defendant's mandatory prison sentence. *State v. Clements*.

Juvenile remands are to be given credit for time spent in juvenile detention for the adjudicated offense. *State v. Ritch*.

Time spent in other jurisdictions is to be credited to defendant if held there for the adjudicated offense. *State v. McClintec*.

Defendant not to be given credit for time under arrest, only time in custody. *State v. Cereceres*.

The court may impose consecutive one-year jail terms when imposed as conditions of distinct probations. *State v. Richardson*.

For probation absconders, time tolls until the probation disposition hearing. *State v. Snider*.

Defendants are to be given credit for any part of a day spent in custody and Leap Year. *State v. Carnegie* and *State v. Pennington*.

Defendants do not have to be given credit for time spent in custody preceding a violation hearing. *State v. Snider*.

State v. Brooks, 261 Ariz. Adv. Rep. 22 (1998) - A defendant held in jail on both a new charge and a probation violation is entitled to presentence credit as to each sentence when concurrent sentences are imposed.

The defendant was arrested on drug charges and remained in custody. A probation violation warrant was also issued. The court sentenced the defendant to prison on all charges. On the probation violation, the court gave him credit in custody for all the previous time served. However, the court refused to give the defendant credit for the time he spent in custody in the drug charges, since the defendant could not be released anyway.

The court of appeals disagreed. According to A.R.S. § 13-709(B), the defendant is to be given credit for all time spent in custody pursuant to that offense. As in *State v. Brooks*, 161 Ariz. 177, 777 P.2d 675 (App. 1989), a defendant held in jail on both a new charge and a probation violation is entitled to presentence credit as to each sentence when concurrent sentences are imposed.

State v. Chavez, 253 Ariz. Adv. Rep. 38 (1997) - A.R.S. § 13-901(F) permits a person placed on probation to serve no more than a year as a condition of probation.

Following the defendant's conviction for Driving Under the Influence, the court placed him on probation and ordered him to serve four months in prison and one year in jail. The defendant appealed. The court of appeals noted A.R.S. § 13-901(F) permits a person placed on probation to serve no more than a year as a condition of probation. In this matter, the defendant could serve no more than eight months in jail.

State v. Everidge, 236 Ariz. Adv. Rep. 37 (1997)

Among other issues, the defendant appealed the court's denial of credit for five days in custody until his release on bond. The court of appeals referred back to *State v. Cruz-Mata*, 138 Ariz. 370 (1983) in granting the defendant credit for this time in custody.

State v. McClure, 237 Ariz. Adv. Rep. 10 (1997) - When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of these sentences, even if the defendant was in custody pursuant to all of the underlying charges prior to trial.

The defendant entered a plea agreement to serve four to five years consecutive to a federal sentence he was serving. At the time of sentencing, the trial court did not give him credit for the 136 days he spent in Arizona awaiting sentencing since he was receiving federal credit for that time. After his post-conviction relief was denied, the defendant appealed, asserting A.R.S. § 13-709(B) required that all presentence time be credited to his sentence.

The court of appeals accepted the defendant's argument that all the time he spent in Arizona was time in custody in relation to his Arizona charges. However, since his plea called for his sentence to be consecutive to his federal sentence, he would receive a "double credit windfall" which the courts precluded in *State v. Cuen*, 158 Ariz. 86 (App. 1988). "When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of these sentences, even if the defendant was in

custody pursuant to all of the underlying charges prior to trial . . . Defendant's sentence satisfied A.R.S. § 13-709(B) because he received credit for his Arizona jail time against his total sentence." Relief was denied.

State v. Carnegie, 174 Ariz. 452 (1993) - The defendant is entitled to credit regardless of the time of day the booking occurred.

The defendant pled guilty to fraudulent schemes and was sentenced to prison with credit for 121 days. The defendant appealed, arguing that he was entitled to the day in which he was booked into jail. The state argued that because the defendant was not in custody for a full twenty-four hours on the day of his booking, he was not entitled to credit for that day. The court of appeals, relying upon *Reynolds*, 170 Ariz. 233 (1992) and *Cereceres*, 166 Ariz. 14 (1990), held that the defendant was entitled to credit regardless of the time of day the booking occurred.

State v Pennington, 149 Ariz. Adv. Rep. 59 (1993) - In a leap year, the defendant must be given credit for the extra day.

The defendant was sentenced to prison in two cause numbers and given credit for time in custody. He subsequently appealed contending he should be given credit for an extra day since 1992 was a leap year. The court of appeals agreed and credited him with an extra day in each cause number.

State v. Crerand, 146 Ariz. Adv. Rep.73 (1993) - The defendant is not entitled to prison good time while awaiting sentencing in the county jail.

The defendant sought special action relief from the trial court's dismissal of his petition seeking "good time" prison credit for the time he spent in jail awaiting sentencing. The defendant argued to do otherwise, the laws favored the rich who could afford bail and be released awaiting sentencing. The defendant contended that such rich offenders would be given the same prison credited as those who remained in jail, thus discriminating against the poor.

The court of appeals dismissed his argument and his special action.

State v. Schumann, 131 Ariz. Adv. Rep. 29 (1993) - The court possesses considerable discretion in awarding credit for presentence incarceration.

The defendant pled guilty to aggravated driving under the influence of intoxicating liquor, a class five felony. The plea agreement stipulated to probation and six months flat time in the Department of Corrections. The plea also provided the defendant would receive credit for all time previously served. At sentencing, the court placed the defendant on probation and ordered as conditions that the defendant serve six months at the Department of Corrections and a jail term equal to the time of presentence incarceration for which he was given credit. The defendant appealed, claiming he was entitled by *State v. Mathieu*, 165 Ariz. 20, to receive credit for his presentence time against his Department of Correction's sentence.

Relying upon *Mathieu*, as well as *Clements*, 161 Ariz. 123, and *Brodie*, 127 Ariz. 150, the court of

appeals reaffirmed its position that the court possessed considerable discretion in awarding credit for presentence incarceration. It noted that in this case the defendant had received credit for the presentence incarceration against one of two sentences imposed. The court's order was affirmed.

State v. Carnegie, 136 Ariz. Adv. Rep. 38 (1993) - The defendant is to be given credit for any part of the day spent in custody, even if it is only one hour.

The defendant was sentenced to prison and given credit for the time he spent in jail awaiting sentencing. However, he was not given credit for a partial day spent following his arrest. The court of appeals reiterated that the defendant is to be given credit for any part of the day spent in custody, even if it is only one hour.

State v. Rivera, 118 Ariz. Adv. Rep. 19 (1992) - There is no basis for sentencing the defendant to both DOC and county jail for the same offense.

The defendant pled guilty to two charges of attempted sexual misconduct with a minor, class 3 felonies. In the first count, the defendant was sentenced to DOC for five years. The court also ordered that if the defendant were released prior to serving five years, the defendant was to serve one year in Maricopa County Jail. On the second count, the defendant was granted lifetime probation with a year in jail. Additionally the defendant was ordered to pay $8.00 time payment on each count. The defendant appealed the jail sentence in the first cause.

The court of appeals found that the sentencing court had exceeded its authority in imposing the year jail in the first cause. There is no basis for sentencing the defendant to both DOC and county jail for the same offense as done in this matter. The court of appeals also overturned the two time-payment assessments ruling that " . . . to order a defendant to pay a time payment fee on a per felony conviction basis would be, in our opinion, both unfair to the indigent defendant and contrary to the intent of the Legislature."

State v. Snider, 118 Ariz. Adv. Rep. 13 (1992) - Time tolls during a violation, therefore time served awaiting disposition does not count as part of the year incarceration maximum as a condition of probation.

The defendant was granted probation in two causes. As a condition of the first probation the defendant was ordered to serve 45 days. No jail was imposed in the second cause. In May, 1990 the probation officer observed a marijuana "roach" at the defendant's home. Two subsequent urinalysis tests were positive for marijuana and marijuana and cocaine. At the ensuing violation hearing, the probation officer testified about following the department's procedures for collecting urine samples. The officer could not testify as to how the tests were analyzed nor the name or qualifications of the analyzer. The officer did not provide the test results himself. The court of appeals ruled this was reliable hearsay, but that a better practice would be to introduce the test reports. The violation was upheld.

In a second issue, the defendant was reinstated to probation in both causes, but was given a 365 day jail term in the second cause. The defendant appealed citing that he should be entitled to the 72 days awaiting disposition after his arrest for probation violation. The court of appeals held that A.R.S. § 13-901(F) indicates the defendant may serve " . . . no more than 1 year in jail *within the period of probation* [emphasis

added]." The 72 days pre-disposition time was "tolled"; time on probation did not start again until after the disposition hearing. Accordingly the court of appeals ruled the trial court did not have to give credit for those 72 days.

State v. Richardson, 116 Ariz. Adv. Rep. 17 (1992) - In sentencing for two distinct offenses, the trial court can impose jail consecutively as conditions of each probation.

The defendant pled guilty to two separate felony charges. The court granted him five years probation in one cause and a second four years probation with one year intensive in the second cause to run concurrently. As special conditions, the defendant was ordered to serve a year in jail for each probation, with the second year to be consecutive to the first. The defendant appealed contending A.R.S. § 13-901(F) allows that a defendant may not serve time in jail exceeding one year.

The court of appeals disagreed, finding that each probation term was imposed distinctly and the court was permitted to impose distinct and, if necessary, consecutive one-year periods of incarceration. In sentencing for two distinct offenses, the court of appeals could find no reason the trial court could not impose jail consecutively. "The defendant is not entitled to two for the price of one."

State v. Chavez, 116 Ariz. Adv. Rep. 22 - One's presentence custody shall be credited only against one sentence.

The defendant was placed on probation for two offenses and ordered to serve 134 days as a condition of probation in addition to the presentence incarceration of 47 days. Eventually the defendant's probations were revoked and he was sentenced to two consecutive prison terms after having served another 58 days awaiting the disposition hearing. The trial court credited the total 238 days to only his first prison sentence, with no credit on his second prison sentence. The defendant appealed contending A.R.S. § 13-709 provided that he should have received credit for the 47 days and 134 days on both sentences.

Relying on *State v. Cruz-Mata*, 138 Ariz. 370, 674 P.2d. 1368 (1983) and *State v. Cuen*, 158 Ariz. 86, 761 P.2d 160 (1988), the court of appeals upheld the sentencing order. The court of appeals felt that these decisions provided an exception to A.R.S. § 13-709 (B) in that " . . . if one's presentence custody is concurrently incurred pursuant to two or more offenses, and if one ultimately receives consecutive prison terms for those offenses, one's presentence custody shall be credited only against one sentence." The court of appeals felt it must follow the same reasoning in calculating presentence time as with the time spent in custody as a condition of probation. The judgment and conviction were affirmed.

State v. Reynolds, 104 Ariz. Adv. Rep. 6, 823 P.2d 681 (1991)

The Arizona Supreme Court vacated the court of appeals decision that time spent in a residential program was to be credited for time in custody. The Arizona Supreme Court held that time in custody applied only to time spent in jail or prison on that charge.

State v. Nieto, 100 Ariz. Adv. Rep. 15, 821 P.2d 285 (1991)

At sentencing, the court ordered the Department of Corrections (DOC) to calculate the defendant's presentence incarceration credit. A.R.S. § 13-709 imposes this responsibility on the court at the time of sentencing. To make DOC do it deprives the defendant of challenging the matter until the time for appeal has expired.

State v. Brown, 92 Ariz. Adv. Rep. 38, 816 P.2d 932 (1991) - Undesignated offenses can serve more time in custody as a condition of probation than if they were sentenced as a misdemeanor. The length of probation bears no relationship to the eventual designation of the charge, but only operates to set a maximum period of supervision.

The defendant pled guilty to theft, a class 6 undesignated offense. The court placed the defendant on three years intensive probation and ordered not more than 30 days in county jail, 45 days eligibility screening for shock probation, and 120 days in shock probation for a total of 195 days in custody. The defendant appealed arguing that time in custody was greater than the maximum he could receive if the court eventually designated the offense as a class 1 misdemeanor.

The court of appeals noted that previously it has been ruled that the length of probation bears no relationship to the eventual designation of the charge, but only operates to set a maximum period of supervision Moreover, since A.R.S. § 13-702(H) specifies that undesignated offenses will be treated as a felony unless and until designated as a misdemeanor, " . . . the defendant's term of incarceration was not limited by the maximum misdemeanor sentence of six months."

State v. Cereceres, 800 P.2d 1 (1990) - Credit for time served does not include time spent "under arrest."

Credit for time served does not include time spent "under arrest." The defendant was arrested at 10:00 p.m. but not booked in until late the next morning. He was not entitled to credit for in-custody time until booked into jail. For purposes of calculating presentence incarceration credit, time actually spent in custody is " . . . only time spent under conditions tantamount to incarceration in a jail or prison."

State v. Mathieu, 795 P.2d 1303 (1990)

Defendant must be given credit for presentence jail time when sentenced to prison for six months as a condition of probation. The court ruled there was no practical difference between a prison sentence and prison as a condition of probation.

State v. McClintec, 774 P.2d 829 (1989)

Defendant to be given credit for time served in other jurisdiction as long as being held by Arizona's charge.

State v. Ritch, 774 P.2d 234 (1989)

The court must give juveniles credit for the time they spent in juvenile facility pending the eventual remand to adult court.

State v. Whitney, 768 P.2d 638 (1989)

A defendant is not entitled to credit for time served on a new sentence imposed consecutive to the parole violation sentence for which he was given credit (no double credit).

State v. Clements, 776 P.2d 801 (1989)

In class 5 DUI felony cases which require as a condition of probation six months in Department of Corrections, the court may give the defendant credit for presentence custody time. It is, however, a discretion of the court, not every case will be given credit.

State v. Houde, 1 CA-CR 10155 Department A (Memorandum Decision 1987)

Step-by-step method of computing presentence incarceration time.

State v. Lopez, 736 P.2d 369 (1987)

Sentencing day, if in custody, is not to be counted for presentence credit.

State v. Vasquez, 736 P.2d 803 (1987)

Time spent in a drug rehabilitation program, as a condition of probation, does not qualify as time in custody for purposes of credit statutes.

State v. Webb, 723 P.2d 642 (1986)[3]

The court may not give flat time sentences to misdemeanors.

[3]Voided by A.R.S. § 13-707(B)(1987)

State v. Cruz Mata, 674 P.2d 1368 (1983)

Time in custody must be applied to each concurrent sentence.

Green v. Superior Court, 647 P.2d 166 (1982)

As part of the defendant's conditions of probation, he was allowed to serve his one year of jail time in a neighboring community and to be released for work and counseling. With just five days to go to complete his jail time, the defendant was found by the probation officer to have missed jail on a number of occasions. Although a violation petition was filed, the court dismissed it preferring to modify the conditions of probation. The state sought to not give the defendant credit for any time that he had been released. The court concurred.

On appeal, the court of appeals denied the modification because it would have resulted in the defendant serving a period of incarceration in excess of one year, a result expressly prohibited by statutes. The court of appeals held that the proper interpretation of A.R.S. § 13-901(F) included all time spent on authorized release as well as time spent in confinement.

State v. San Miguel, 643 P.2d 1027 (1982)

When the defendant was held for probation violation, but released OR on new charge, credit for presentence incarceration may be applied only to the sentence imposed on the probation matter.

State v. Benton, 19 Ariz. 333, 507 P.2d 135 (1973)

Time spent on probation is not to be credited to a subsequent terminal disposition.

Undesignated Offenses

State v. Delgarito, 238 Ariz. Adv. Rep. 39 (1997) The defendant must be given notice if the court designates the offense a felony.

The defendant pled guilty to a class 6, undesignated offense and was granted probation for one year. At the time of sentencing, the trial court explained to the defendant that by pleading guilty, he relinquished his right to a direct appeal and that his only review was by a petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure.

At the conclusion of his probation, the court, without notice or a hearing, designated the offense a felony. An order was entered terminating probation and entering a judgment in the amount $220.00 against the defendant for the balance of the cost of prosecution. The defendant appealed.

Originally the court of appeals dismissed the appeal, citing a lack of jurisdiction. The court of appeals went on to state it was necessary for the defendant to seek relief through Rule 32, post-conviction relief. After the defendant filed a motion for reconsideration, the court of appeals reinstated the appeal.

Noting that the Rule 32 process had been established to "unclog an appellate system burdened with guilty plea and probation violation admission appeals . . . ," the court of appeals concurred with the defendant that A.R.S. § 13-4033(A)(2) provided him with a basis for his appeal being heard. A.R.S. § 13-4033(A)(2) states that a defendant may appeal from "[a]n order denying a motion for a new trial or from *an order made after judgment affecting the substantial rights of the party*." (Emphasis added.)

Reasoning that a felony designation deprived the defendant of the ability to vote, hold office and serve as a juror, the court of appeals agreed that the defendant's appeal could be heard. This differs significantly from the probation condition appealed in *State v. Jimenez*, 232 Ariz. Adv. Rep. 33 (App. Dec. 24, 1996).

Having accepted jurisdiction, the court of appeals reversed the felony designation and remanded to the trial court to set a felony designation hearing with notice to the defendant.

State v. Shlionsky, 209 Ariz. Adv. Rep. 30 (1996) - The defendant must receive notice before the court designates the offense a felony.

The defendant was convicted of possession of marijuana, a class 6 felony, with the court placing him on probation and allowing the charge to remain undesignated. During his probationary period, the state alleged six violations. The defendant admitted to five of them; the sixth, alleging a new crime, was dismissed. The court accepted the admissions, placed him on Intensive Probation Supervision and designated the offense a felony. The defendant filed a petition for post-conviction relief, contending that 1) his right to due process was violated by designating the offense without giving him notice and an opportunity for an evidentiary hearing; 2) the felony designation was an abuse of discretion; 3) he was denied a right to allocution; and 4) the court had to wait until the end of probation to designate the offense a felony.

The court of appeals held that the 1984 revision in A.R.S. § 13-702(G) permitted the court to place the defendant on probation and "'*may* . . . refrain from designating the offense as a felony or misdemeanor until the probation is terminated,' but need not do so if future circumstances dictate otherwise. Thus, the court

in this case did not err in designating petitioner's offense a felony at the disposition hearing, even though it continued petitioner on probation."[emphasis added].

In addressing the issue of notice, the court of appeals noted the defendant was given notice of the disposition hearing and was present when the matter was designated. The defendant had originally requested a mitigation hearing but withdrew the request when he learned the court stated its intention to continue him on probation. When advised that the court intended to designate the offense a felony, the defendant did not request another mitigation hearing. The court of appeals held the defendant's right to due process was not violated. Nor did the court of appeals find the trial court abused its discretion or denied the defendant his right to allocution. Relief was denied.

State v. Corno, 168 Ariz. Adv. Rep. 24 (1994) - The trial court can reject the sentencing stipulations of the plea, including the designation of the offense as a felony or misdemeanor, but in so doing, must allow both parties the opportunity to withdraw from the plea.

The defendant and the state entered a plea agreement in which the defendant would pled guilty to a class 6 felony charge. At the time of sentencing, the court felt the felony designation was too harsh and ordered that the offense should remain undesignated. The state moved to withdraw from the plea agreement. The court denied this motion, indicating that the designation was procedural rather than substantive and was not something that could be included in the bargaining between the state and the defendant.

The court of appeals rejected this premise. Referring to *State v. Diaz*, 173 Ariz. 270 (1992), the court of appeals inferred that the Arizona Supreme Court recognized the parties' right to bargain for the designation of such offenses. The court of appeals went on to note that the trial court could reject the sentencing stipulations of the plea, but in so doing, must allow both parties the opportunity to withdraw from the plea. The case was remanded.

State v. Benson, 148 Ariz. Adv. Rep. 67 (1993) - The defendant must be given personal notice of the proceeding to designate an undesignated offense as a felony.

The defendant was placed on probation for an undesignated offense which the trial court left undesignated while the defendant was on probation. Six weeks after the defendant's probation expired, the court ordered a hearing to determine whether the offense should be designated a felony. Notice was sent to the prosecutor, the probation officer, and the defendant's public defender. At the scheduled hearing, the defense requested a continuance because the defendant had not been located. At the second hearing, without the defendant present and over the objections of the defense attorney, the court designated the defendant's conviction a felony. The defense appealed citing the court's failure to give notice to the defendant.

The court of appeals concurred. It found that the defendant had not been given personal notice of the proceeding. The trial court's order was vacated.

State v. Arana, 128 Ariz. Adv. Rep. 5 (1993) - An undesignated offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor.

The defendant pled guilty to a class six undesignated offense. She was placed on probation and

ordered to pay the $100 felony assessment. The defendant appealed the assessment. The court of appeals reversed the imposition of the assessment holding that when a court suspends the designation of an offense under A.R.S. § 13-702 (H), " . . . it may not impose sanctions that exceed the statutory parameters for misdemeanors." The state petitioned the Arizona Supreme Court for review.

The Arizona Supreme Court reversed the court of appeal's decision. Citing A.R.S. § 13-702(H), the Arizona Supreme Court noted that it expressly provides that "[T]he offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor." The Arizona Supreme Court found this language unequivocal in so far as the felony assessment was concerned.

Moreover, the Arizona Supreme Court cited *State v. Sweat*, 143 Ariz. 266 and *State v. Rischer*, 117 Ariz. 587, in which it held that a defendant found guilty of an undesignated felony offense may be placed on probation for a period of time longer than the maximum sentence for a misdemeanor and still have the offense designated as a misdemeanor upon successful completion of probation.

State v. Diaz, 128 Ariz. Adv. Rep. 28 (1993) - Despite a plea agreement, the court can designate the offense a felony and not allow the defendant to withdraw from the agreement.

The defendant entered a plea to possession of marijuana, a class six undesignated offense. At the time the plea was accepted, the defendant was advised that it could be treated as a misdemeanor or a felony at the court's discretion. At sentencing the court designated the offense a felony. The defendant moved to withdraw from the plea. The court denied the motion to withdraw and sentenced the defendant to three years probation and one year jail. The defendant appealed the felony designation.

The court of appeals reversed, holding that the trial court abused its discretion in not allowing the defendant to withdraw his plea. The state requested a review by the Arizona Supreme Court.

The Arizona Supreme Court upheld the trial court's original finding. It noted that first, A.R.S. § 13-702(H) allows the court to provide a felony designation for a class six undesignated offense at the time of sentencing. Secondly, the plea agreement did not preclude the trial court from doing such. Accordingly, it found that the trial court did not have to allow the defendant to withdraw from the plea.

State v. Brown, 92 Ariz. Adv. Rep. 38, 816 P.2d 932 (1991) - The defendant's term of incarceration was not limited by the maximum misdemeanor sentence of six months after pleading guilty to an undesignated offense.

The defendant pled guilty to theft, a class 6 undesignated offense. The court placed the defendant on three years intensive probation and ordered not more than 30 days in county jail, 45 days eligibility screening for shock probation and 120 days in shock probation for a total of 195 days in custody. The defendant appealed arguing that time in custody was greater than the maximum he could receive if the court eventually designated the offense as a class 1 misdemeanor.

The court of appeals noted that previously it has been ruled that the length of probation bears no relationship to the eventual designation of the charge, but only operates to set a maximum period of supervision. Moreover, since A.R.S. § 13-702(H) specifies that undesignated offenses will be treated as a felony unless and until designated as a misdemeanor, " . . . the defendant's term of incarceration was not limited by the maximum misdemeanor sentence of six months."

State v. Starkovic, 1 CA-CR 88-704 Department B (1990)
(Memorandum Decision 1990)

The court found, without defendant present, that he had not complied with all conditions of probation and designated the offense a felony. The court of appeals indicated the defendant should have had an opportunity to present his case for a misdemeanor conviction.

State v. Winton, 736 P.2d 386 (1987)

The court has the authority to designate undesignated offenses as felonies at the time of probation revocation and it may be used as a prior felony conviction.

State v. Welker, 748 P.2d (1987)

Class 4 undesignated charges must be designated at time of sentencing.[4]

[4]Superseded by change in statutes, A.R.S. § 13-702(H), -3403(G) and -3407(

Victims' Rights

Pretrial Interview

State of Arizona v. Hutt, 303 Ariz. Adv. Rep. 35 (1999) - A defense request for a pretrial interview of the victim cannot be generic.

The trial judge granted the defense's request to interview the victim at a pretrial hearing to determine if the victim's refusal of an interview was based upon bias, interest, or hostility. The judge felt that to deny this request would "cut to the heart of the defense and deny the defendant the constitutional guarantees of due process." The state filed a special action.

With Judge Lankford dissenting, the court of appeals held that the trial court erred in ordering the interview. In the concurring judges' views, this request was generic and did not represent a situation where the defense's needs outweighed the victim's rights. Judge Lankford did not see this situation as generic and felt the trial judge had more information upon which to base any decision concerning the defendant's constitutional right to due process.

Champlin v. Sargeant, 279 Ariz. Adv. Rep. 7 (1998) - Those who are not victims but merely witnesses of particular criminal behavior, though perhaps victims of other behavior by the same defendant on separate occasions, may be interviewed as to the former but not the latter.

The Arizona Supreme Court reviewed this matter to determine if a victim in one matter who witnesses the same defendant commit a crime against another victim can refuse to be interviewed by the defendant. The court held that A.R.S. §13-4433 should be interpreted that:

> A person who witnesses a crime against others and is also victimized by the same defendant on the same occasion gains protected "victim" status and may not be compelled to grant a pretrial defense interview as to the offense in question. But the victim of crime #1 who is a witness but not a victim of crime #2, committed by the same defendant on another occasion, may be compelled to grant an interview regarding crime #2. Stated differently, those who are not victims but merely witnesses of particular criminal behavior, though perhaps victims of other behavior by the same defendant on separate occasions, may be interviewed as to the former but not the latter. . . We hold that the trial court, pursuant to A.R.S. §13-4433(A), may order depositions of persons who witness but are not victims of criminal conduct, even though such persons may have been victims of other offenses committed by the same defendant on other occasions.

State v. Riggs, 247 Ariz. Adv. Rep. 7 (1997) - A.R.S. § 13-4433(E) neither authorizes nor precludes the cross-examination of a victim on the victim's refusal to grant a pretrial interview. Admission of evidence of refusal is governed by the rules of relevancy.

The Arizona Supreme Court granted review of two differing opinions on whether a criminal defendant may bring out in court that a victim refused a pretrial interview. In *State v. Taggart*, 186 Ariz. 569, 925 P.2d 710 (App.1996), the court of appeals held that a criminal defendant is always permitted to bring out the victim's refusal of a pretrial interview with the defendant. In *State v. Riggs*, 186 Ariz. 573, 925 P.2d 714 (App. 1996), the court of appeals held that a criminal defendant is never permitted to bring out at trial a victim's refusal of a pretrial interview with the defendant when the victim's sole reason for refusing the interview is that the victim has a constitutional right to do so.

A.R.S. § 13-4433(E) states: "If the defendant or the defendant's attorney comments at trial on the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right to refuse an interview under the Arizona constitution." The state and the defendant disagree as to what this statute means. The state interpreted it to mean that any statements at trial that the victim refused an interview are improper. The defendant read it to mean that cross-examination of the victim regarding his or her refusal to be interviewed was authorized and the statute was to provide guidance to the jury.

The Arizona Supreme Court held that ". . . A.R.S. § 13-4433(E) neither authorizes nor precludes the cross-examination of a victim on the victim's refusal to grant a pretrial interview. Admission of evidence of refusal is governed by the rules of relevancy. The state constitution confers no blanket right upon a victim to refuse to testify concerning the fact of refusal, and the federal constitution confers no blanket right upon defendants to inquire into the fact of refusal." The convictions were affirmed and the court of appeals' opinions were vacated.

State v. Superior Court in Maricopa County, 223 Ariz. Adv. Rep. 25 (1996) - The parents of a deceased qualify as 'victims' only if the deceased was killed by the alleged criminal offenses with which the defendant is charged. Suicide does not entitle the parents to victim status.

Coronado was accused of sexually assaulting the victim, a woman co-worker at the same health care center. The victim reported the incident to her employer through her supervisor. She later came to believe that her supervisor was insensitive and felt betrayed also by her employer. In early 1996, the victim broke into her supervisor's home at gunpoint. When the police arrived, the victim locked herself in the bathroom and committed suicide by shooting herself in the head.

Coronado was eventually indicted for sexual assault charges against the deceased victim. After the state listed the victim's parents as witnesses, the defense counsel filed a motion to interview them. The state argued that the parents had the right to refuse the interviews pursuant to the Victims' Bill of Rights. The trial court granted the defense motion to interview the parents stating:

> . . . it would be my preliminary view that I believe the [Victims' Bill of Rights] would not extend to the parents of the deceased in a case such as this where the victim's death is not directly related to the alleged crimes.

The state appealed arguing the court used the narrower definition of "victim" provided in the Arizona Rules of Criminal Procedures rather than that provided by the Bill. As defined by the Bill, a "victim" is "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the persons' spouse, parent, child, or other lawful representative, except if the person is in custody for an

offense or is the accused." The Rules define "victim" as "a person against whom a criminal offense as defined by 13-4401(6) has allegedly been committed, or the spouse, parent, lawful representative, or child of someone killed or incapacitated by the alleged criminal offense, except where the spouse, parent, lawful representative, or child is also the accused." The state argued the rule was in conflict with the constitution because the constitution does not expressly require that the deceased be killed by the alleged criminal offender.

The court of appeals reasoned that the constitution implied that the deceased had to be killed by the offender in order for the parents to be defined as victims. "The parents of the deceased qualify as 'victims' only if the deceased was killed by the alleged criminal offenses with which the defendant is charged." Moreover, the court of appeals noted that the state failed in its arguments that Coronado's conduct ultimately resulted in the deceased's suicide. Her animosity seemed more directed at her supervisor. The trial court's order was affirmed.

State v. Riggs, 214 Ariz. Adv. Rep. 20 (1996) See ***State v. Riggs***, 247 Ariz. Adv. Rep. 7 (1997) which supercedes this holding.

The defendant appealed his conviction for forgery. As part of his appeal, he argued that the trial court violated his right to confrontation when it refused to allow him to examine the victim about his refusal to grant a pre-trial interview.

In a two-to-one opinion with Judge Kleinschmidt dissenting, the court of appeals concurred with the state that Arizona Revised Statute § 13-4433(E) provides that, if a defendant comments at trial on the victim's refusal to be interviewed, the jury is to be instructed that the victim has the right to refuse an interview, pursuant to the Arizona Constitution. The court of appeals construed this as a remedy in the event comment on the victim's constitutional right is made. "The statute does not recognize a defendant's right to inquire as to the reason a victim has declined to be interviewed, as there is no such right. . . . It would be fundamentally unfair to allow the victim's exercise of this constitutional right to be burdened by consequent attacks on trial testimony which the victim can be compelled to provide." The court of appeals upheld the trial court's decision to preclude the defense from asking the victim about his refusal to grant a pre-trial interview.

State v. Taggart, 214 Ariz. Adv. Rep. 17 (1996) - The defendant has a right to ask the victim if he refused a pretrial interview.

The defendant was charged with aggravated assault. The two victims refused pre-trial interviews with the defense. At the trial, the defense asked one of the victims if he had refused to grant a pretrial interview. The court sustained the state's objection. The defendant was found guilty. On appeal, the defendant maintained that the court's denial of his right to cross-examine the victim violated his constitutional rights.

The court of appeals, with Judge Kleinschmidt writing the opinion, concurred with the defendant. "The right to cross-examine a witness is a vital part of confrontation. . . . However, cross-examination may be restricted based on concerns for harassment, prejudice, or marginal relevance. . . . While a victim's refusal to be interviewed may be based on nothing more than a desire to be left alone, it must remain the jury's prerogative to decide whether such a refusal reflects on the victim's credibility." While supporting the defendant's arguments, the court of appeals found the errors were harmless and affirmed the conviction.

State v. Stapleford, 217 Ariz. Adv. Rep. 41 (1996) - Persons in custody are not covered by Victims' Rights.

The defendant was charged with aggravated assault against his prison cellmate. The victim cellmate declined a pretrial interview by the defense. The trial court and court of appeals denied the defendant's motion to compel the interview. The Arizona Supreme Court accepted jurisdiction to resolve the issue whether prisoners can claim victims' rights.

The Arizona Supreme Court granted the defendant's motion for the interview. The language of the constitutional amendment is clear that victims' rights apply " . . . except if the person is in custody for an offense or is the accused." The Arizona Supreme Court noted that its comments to Rule 39, " . . . it appeared inadvisable to exclude . . . inmate/victims from the rights guaranteed by the Arizona Constitution," may have led to the trial court's confusion in this matter.

A.H. v. Superior Court for Mohave County, 209 Ariz. Adv. Rep. 25 (1996) - When the victim's presentence testimony is clearly relevant and may be important to the sentencing outcome, the trial judge does have discretion to compel such testimony.

Kenneth Inman pled guilty to attempted sexual conduct with the victim, A.H. Although conceding his guilt, he insisted his conduct was not as serious as the state suggested. He subpoenaed the victim to testify at a presentence hearing. The victim's guardian ad litem sought to quash the subpoena, arguing the Victims' Bill of Rights allowed the victim to refuse to appear and testify. The trial court agreed that the victim's testimony would be helpful and relevant. He ordered a videotaped interview/deposition of the victim at which Inman would be excluded. The victim's attorney filed a special action.

The court of appeals began by noting that although a defendant does not have a constitutional right to confront and cross-examine his accusers at the sentencing stage, *State v. Ortiz*, 131 Ariz. 195 (1981), a defendant does have the right to compel the attendance of witnesses in his defense. State v. Ramirez, 178 Ariz. 116 (1994). This right extends to a defendant's sentencing hearing . . . *State ex rel. Dean v. City of Tucson*, 173 Ariz. 515, (App. 1992) held that victims could have to testify at pretrial hearing. Using the same logic, the court of appeals in this matter held ". . . that a victim does not have a categorical right to refuse to appear and testify at presentence proceedings . . . We do not hold that a defendant in every case can compel a victim to testify at a mitigation hearing. When such testimony is clearly relevant and may be important to the sentencing outcome, the trial judge does have discretion to compel such testimony."

State v. Roscoe, 211 Ariz. Adv. Rep. 11 (1996) - To the extent that they conflict with the definition of the term 'victim' as provided in the Victims' Bill of Rights, A.R.S. § 13-4433(F) and Rule 39(b)(11), Ariz.R.Crim.P. are unconstitutional.

The defendant was convicted of aggravated assault on a police officer. During the court proceedings, the defendant requested interviews with the officers/victims. They declined citing the Arizona Constitutional provision which grants a victim of a crime the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant. The defendant cited A.R.S. § 13-4433(F) and Arizona Rules of Criminal Procedure 39(b) which provide that peace officers shall not be considered "a victim" if they are acting in their official capacity when injured.

The court of appeals noted that neither the legislature nor the courts have the power to abrogate

rights provided in the Constitution. "Courts must apply the plain language of the Victims' Bill of Rights . . . A.R.S. § 14-4433(F) and Rule 39(b) are accordingly unconstitutional and the trial court correctly denied [the defendant's] request to interview the officers".

After the court of appeals affirmed, the defendant filed for review by the Arizona Supreme Court. That court held that the statutes and rule were in conflict with the Constitutional amendment and ". . . [t]o the extent that they conflict with the definition of the term 'victim' as provided in the Victims' Bill of Rights, A.R.S. § 13-4433(F) and Rule 39(b)(11), Ariz.R.Crim.P. are unconstitutional."

State v. Superior Court in Maricopa County, Judge Bolton, 200 Ariz. Adv. Rep. 31 (1995) - A victim struck by a defendant who is found guilty of aggravated DUI is considered a victim and entitled to Victims' Rights.

Patrick Cunningham struck a vehicle driven by Peter Munjas. Cunningham was charged with aggravated driving while under the influence of intoxicating liquor, a class 4 felony. During discovery, Cunningham's counsel requested that he interview Munjas. Munjas refused pursuant to victims' rights contained in A.R.S. § 13-4433. The trial judge granted Cunningham's motion to depose Munjas, finding that because he was not a crime victim he could not refuse a defense interview. The state filed a special action to determine if the trial judge erred in ruling that a person suffering property damage in a DUI collision is not a "victim" as defined by A.R.S. § § 13-4401 through -4437.

The court of appeals noted Cunningham asserted that Munjas was not a victim because DUI is a "victimless" crime, Cunningham did not intend to harm Munjas, and Munjas was not personally "harmed" by the collision. Relying upon the plain language of the Victims' Bill of Rights, the court of appeals held Munjas fell within the definition of "victim" as "a person against whom the criminal offense was committed."

"Although Cunningham only damaged Munjas' car rather than Munjas personally, the crime of DUI was nonetheless committed against him. Similarly, the definition of criminal offense . . . requires us to conclude that Cunningham's actions constituted a criminal offense threatening Munjas with physical injury. Common sense demands the same conclusion . . . Cunningham did not need a specific intent to harm Munjas . . . [and] he was the victim of property damage because his car was damaged. The statutory and constitutional provisions of the Victims' Bill of Rights do not require that a victim suffer personal injury to fall within the definition of a crime victim." The court of appeals held Munjas could refuse a pre-trial defense interview. The trial court's order was reversed.

State v. Lamberton, 194 Ariz. Adv. Rep. 32 (1995) - Neither the Victims' Bill of Rights nor the Implementation Act authorize the victim to participate in an appeal.

Lamberton filed for post-conviction relief of his 12-year prison sentence following a plea to child molestation. The trial court held an evidentiary hearing, at which the victim and others testified. The trial court granted the defendant's petition and set a date for re-sentencing. The state and victim filed separate petitions for review in the court of appeal challenging the trial court's action. The court of appeals denied the victim's petition for review stating " . . . the scope of the remedy afforded by (Rule 32.9) only extends to *aggrieved parties*; therefore, the Victim's Petition for Review is without the jurisdiction of this court."

The victim filed a special action with the Arizona Supreme Court, alleging the court of appeals' decision to dismiss her petition is contrary to the Victims' Bill of Rights and the Victims' Rights Implementation Act. The Arizona Supreme Court noted that "criminal proceedings" to which Victims' Rights pertain only

include matters before the trial court. In this matter, the victim was allowed to testify at the evidentiary hearing. "The parties to a criminal proceeding are the defendant and the state." Neither the Victims' Bill of Rights nor the Implementation Act authorize the victim to participate in an appeal. The Arizona Supreme Court affirmed the court of appeal's action.

State v. Blackmon, 197 Ariz. Adv. Rep. 10 (1995) - Rgardless of whether the victim testifies under oath or makes an unsworn statement, the principle of *Asbury* applies, and the defendant should have been allowed to cross-examine the victim.

The defendant pled guilty to sexually assaulting his estranged wife. Prior to sentencing, the defendant moved to excise portions of the presentence report and requested the opportunity to cross-examine his wife as to statements she made that were included in the presentence report. At the sentencing, the victim was permitted to make an unsworn statement and the defendant was not permitted to cross-examine her since the court held the Victims' Bill of Rights permitted her this privilege. Following sentencing, the defendant filed for post-conviction relief, arguing the trial court violated his right to due process of law in refusing to allow him to cross-examine the victim. He argued the Victims' Bill of Rights did not prohibit a defendant from calling the victim to testify at a presentencing hearing, or even if it did it could not override his right to due process.

The trial court noted that before the Victims' Bill of Rights, the law was that a defendant had a due process right to question victims who testified at presentence hearings. [*State v. Asbury*, 145 Ariz. 381, 701 P.2d 1189 (App. 1984)]. The judge noted nothing in the Victims' Bill of Rights seemed to abolish this right, and that *State ex re. Dean v. City Court of City of Tucson*, 173 Ariz. 515, 844 P.2d 1165 (App. 1992), which was decided after the Victims' Bill of Rights was enacted, required a victim to testify at a preliminary hearing. The judge concluded that the Victims' Bill of Rights did not preclude the defendant from calling the victim to testify at the hearing, and thus, the rule in *Asbury* still applied. The judge also noted that a defendant's due process right would be paramount to any rights of a victim not to testify. [*State ex rel. Romley v. Superior Court*, 172 Ariz. 232 , 836 P.2d 445 (App. 1992)]. The court granted the defendant's petition for post-conviction relief. The state appealed arguing *Asbury* is not applicable because it was decided before the Victims' Bill of Rights was enacted and that *Dean* is inapplicable because it involved pretrial proceedings rather than sentencing.

The court of appeals concurred with the trial court. "We agree with the trial judge that, regardless of whether the victim testifies under oath or makes an unsworn statement, the principle of *Asbury* applies, and the defendant should have been allowed to cross-examine the victim . . . We need not decide whether the Victims' Bill of Rights precludes a defendant from compelling a victim to testify and be cross-examined at a presentencing hearing should the trial judge find such testimony relevant to the proceeding."

State v. Superior Court (Flores), 185 Ariz. Adv. Rep. 18 (1995) - the prosecutor does not 'represent' the victim as a 'client' in a way that runs afoul of the Rules of Professional Conduct. Where there is no 'appearance of impropriety' to any level of sufficiency to cause disqualification of the County Attorney's Office from prosecution of either this case or prosecution of the victim in another case.

Flores and Gongora were indicted for crimes arising from a drive-by shooting at J.M. the victim. J.M. was previously indicted on attempted murder and aggravated assault charges arising from different circumstances. The Maricopa County Attorney's Office was involved in prosecuting both cases. Gongora

and Flores alleged the prosecutor had a conflict of interest in the prosecution of both cases and there was the appearance of impropriety. The trial court agreed and ordered the state to withdraw from one of the cases. The state filed for special action.

The defendants contended that although the victim did not seek the disqualification of the prosecutor, the defendants had standing because the victim's willingness to please the prosecutor could affect their own due process to a fair trial. They felt that since the adoption of victims' rights, " . . . the prosecuting agencies have become quasi-representatives of alleged victims." The defendants alleged the prosecutor could not represent the victim in one matter and then prosecute him an another. They based their allegation of a conflict " . . . on the prohibition against litigating adversely to a former client in a subsequent matter."

Relying upon *Hawkins v. Auto-Owners (Mut.) Ins. Co.*, 579 N.E.2d 118; *Lindsey v. State*, 725 P.2d 649; *State v. Eidson*, 701 S.W.2d 549; and *Rutledge v. State*, 267 S.E.2d 199, the court of appeals held " . . . the prosecutor does not 'represent' the victim as a 'client' in a way that runs afoul of the Rules of Professional Conduct . . . [and] the facts of this case do not raise an 'appearance of impropriety' to any level of sufficiency to cause disqualification of the Maricopa County Attorney's Office from prosecution of either this case or prosecution of the victim in another case." The trial court's ruling was overturned.

Benton v. Superior Court in Navajo County, 176 Ariz. Adv. Rep. 35 (1994) - the Victims' Bill of Rights does not permit a victim to refuse to testify against the person on trial for committing the crime against the victim. The physician-patient privilege did not apply under the circumstances of this case because the public's interest in protecting victims outweighs the privacy interest reflected in the physician-patient privilege.

The police, responding to a disturbance call at a motel, found that Gwendolyn Benton and a man had been beaten by Ricky Ward, a man with whom Benton had a relationship resulting in a child. Both victims were taken to the hospital for their injuries. Ward was arrested and charged with aggravated assault and burglary. In its prosecution of Ward, the state requested Benton's medical records relating to the treatment she received as a result of Ward's alleged assault. Benton refused to release the records. The trial court granted the state's request to produce the records. Benton filed a special action arguing that her medical records were protected by the Victims' Bill of Rights and accompanying statutes A.R.S. § 13-4401 to 13-4438 and by the physician-patient privilege contained in A.R.S. § 13-4062(4).

The court of appeals accepted jurisdiction but denied relief to Benton. Citing *S.A. v. Superior Court*, 171 Ariz. 529 (1992), the court of appeals reiterated that the Victims' Bill of Rights does not permit a victim to refuse to testify against the person on trial for committing the crime against the victim. It may not be used as a " . . . sword in the hands of victims . . . to thwart the prosecution of wrongdoer . . . Nothing in the constitution or statutes indicates that a victim can impede a criminal prosecution by refusing to release medical records necessary for the prosecution of a defendant. Accordingly, this ground for the claim for relief has no merit."

The court of appeals further ruled that the physician-patient privilege did " . . . not apply under the circumstances of this case because the public's interest in protecting victims outweighs the privacy interest reflected in the physician-patient privilege. . . In prosecutions which arise out of a domestic dispute, it is not unusual that a victim does not wish to cooperate with the prosecution . . . Without access to the medical records of a victim, especially a victim who refuses to cooperate with the state because of fear, dependence or the desire for reconciliation, a criminal prosecution can be totally frustrated." The court of appeals went on to note that the physician-patient privilege has never been absolute. Physicians are required by legislation to report knife and gun wounds, contagious diseases, and abuse of minors, among other things. In other

instances, the court itself has established instances when the privilege is limited.

State v. Roscoe, 166 Ariz. Adv. Rep. 12 (1994) - See ***State v. Roscoe***, 211 Ariz. Adv. Rep. 11 (1996) which supercedes this holding.

The defendant was convicted of aggravated assault on a police officer. During the court proceedings, the defendant requested interviews with the officers/victims. They declined citing the Arizona Constitutional provision which grants a victim of a crime the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant. The defendant cited A.R.S. § 13-4433(F) and Arizona Rules of Criminal Procedure 39(b) which provide that peace officers shall not be considered "a victim" if they are acting in their official capacity when injured.

The court of appeals noted that neither the legislature nor the courts have the power to abrogate rights provided in the Constitution. "Courts must apply the plain language of the Victims' Bill of Rights . . . A.R.S. § 14-4433(F) and Rule 39(b) are accordingly unconstitutional and the trial court correctly denied [the defendant's] request to interview the officers."

Knutson v. County of Maricopa (Romley), 131 Ariz. Adv. Rep. 19 (1993) - While Rule 39 imposed upon lawyers and judicial personnel specific obligations to victims, it did not allow a victim to "state a claim in negligence for a prosecutor's failure to comply with those provisions.

The victim sought damages from the county because, as required by Rule 39, she was not provided notice of the time, date and place of a change of plea, was not conferred with on the plea agreement, and the prosecutor had informed the court that both had occurred.

The court of appeals held that since the State's constitutional Victims' Bill of Rights had not been approved at the time of these events, the victim had no constitutional right to a constitutional tort. The court of appeals also held that while Rule 39 imposed upon lawyers and judicial personnel specific obligations to victims, it did not allow a victim to "state a claim in negligence for a prosecutor's failure to comply with those provisions."

S.A. v. Superior Court in Maricopa County, 171 Ariz. 529 (1992) - There is no provision in the Victims' Rights that permits a victim to refuse to testify at an accused's criminal trial.

The victim was arrested after she refused to honor a subpoena to testify against Beatty in a criminal proceeding. Following her arrest, she argued the Victims' Bill of Rights provided that the court could not compel her to testify at Beatty's trial. Judge Coulter ruled to the contrary. The issue was taken to the court of appeals in a special action.

The court of appeals upheld Judge Coulter's ruling. It found no provision permitting a victim to refuse to testify at an accused's criminal trial. Moreover, since the victim may also be the complaining witness, such a refusal would jeopardize the defendant's right to confront the accuser. Additionally, the court found that to honor such a refusal would permit victims to usurp the prosecutor's discretion in his/her charging decisions. Victims could be pressured by the accused to refuse to testify citing victims' rights and preclude prosecution. Just as in *Roper*, in which case it was said that " . . . the Victims' Bill of Rights should not be a sword in the

hands of victims to thwart a defendant's ability to effectively present a legitimate defense, . . . the Victims' Bill of Rights should not be a 'sword in the hands of a victim' to thwart the prosecution of a wrongdoer."

State v. Gottsfield/Roper, 172 Ariz. 232 (1992) - The victim can refuse to make available to defense the victim's medical records. However, an *in camera* inspection of the medical records would prepare the trial court to timely assess the necessity of the medical records for the defendant's effective, reasonable cross-examination or argument of self defense.

In the trial court, Roper was charged with aggravated assault with a knife against her husband. She filed a motion to obtain all of the victim's past and present medical records, contending the records would show the victim had been treated for years for multiple personality disorder. Roper alleged that at the time of the assault, the victim was manifesting one of his violent personalities and the defendant acted in self defense. Judge Gottsfield granted the motion indicating the disorder might have impaired the victim's ability to perceive or recall accurately. The records were to be forwarded to the court for the court to hold an *in camera* inspection solely to determine the issue of multiple personalities. The state sought a special action from the court of appeals, citing the Victims' Bill of Rights provision precluding the victim's disclosure of such information.

The court of appeals upheld the *in camera* inspection to determine 1) the presentation of self defense, and 2) which portions were essential to victim's ability to perceive, recall or accurately relate the events of the day of the offense. In its finding, the court wrote that " . . . when the defendant's constitutional right to due process conflicts with the Victims' Bill of Rights in a direct manner, such as the facts of this case presently, then due process is the superior right. This is so because due process is the foundation of our system of law . . . ."

The court of appeals noted that under the Victims' Bill of Rights, the victim could, in fact, refuse to make available to defense the victim's medical records. However, the *in camera* inspection of the medical records would prepare the trial court to timely assess the necessity of the medical records for the defendant's effective, reasonable cross-examination or argument of self defense. The Victims' Bill of Rights "should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial."

State ex rel. Dean v. Tucson City Court, 173 Ariz. 515 (1992) - While the Victims' Bill of Rights precludes the trial court from ordering unwilling victims to submit to interviews by the defendant, it does not permit victims to refuse to be present or to testify at court proceedings such as pretrial hearings.

The defendant, Scritchfield, was cited for criminal damage. He moved to dismiss. The magistrate court set the motion for hearing and subpoenaed the victim. The state moved to quash the subpoena citing that the Victims' Bill of Rights precludes the subpoena of a victim to such a hearing.

The court of appeals ruled that while the Victims' Bill of Rights precludes the trial court from ordering unwilling victims to submit to interviews by the defendant, it does not permit victims to refuse to be present or to testify at court proceedings such as pretrial hearings where the court can ensure the victim is afforded the rights guaranteed by the Victims' Bill of Rights.

State v. O'Neil, 101 Ariz. Adv. Rep. 104 (1992) - The only information obtained in an informal meeting between the proscutor and the victim that be disclosed by the state is that which is discoverable.

In a special action, the court of appeals overturned Judge O'Neil's order requiring the state to provide to the defendant a transcript of an informal meeting between the prosecutor and two victims who declined interviews with the defense. To allow such to occur, the court of appeals ruled it would allow the defendant to make an end run around victims constitutional right to refuse any discovery request. Only that information obtained in such a meeting that is discoverable must be disclosed by the state.

Knapp v. Martone, 170 Ariz. 237 (1992)

In a special action to the Arizona Supreme Court, that court ruled that Mrs. Knapp fell under the definition of a victim since she was never charged and did not meet the definition of an accused in the Victims' Rights Implementation Act. Accordingly as a victim, she could refuse the defendant's request for a deposition. Vice Chief Justice Feldman strongly dissented.